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REPORTS OF CASES ^{c f}

DECIDED IN THE

COURT OF APPEALS

OF THE

91

STATE OF NEW YORK,

FROM AND INCLUDING THE DECISIONS HANDED DOWN JANUARY 16, 1883,
TO THE DECISIONS OF MARCH 20, 1883.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,

STATE REPORTER.

VOL. XLVI.

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6/62

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WILLIAM C. RUGER, CHIEF JUDGE.

CHARLES ANDREWS,

CHARLES A. RAPALLO

THEODORE MILLER,

ROBERT EARL,

GEORGE F. DANFORTH,

FRANCIS M. FINCH,

ASSOCIATE JUDGES.

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PROCEEDINGS

ON ANNOUNCEMENT OF DEATH OF HON. ADDISON GARDINER.

During the session of the court June 6, 1883, the Hon. WM. M. EVARTS announced the death of HON. ADDISON GARDINER, and paid an eloquent tribute to the character of that distinguished jurist. He was followed by ROBERT SEWELL, Esq., who detailed some of the prominent incidents in the life of the deceased. At the close of his remarks RUGER, Ch. J., responded as follows :

“ The court approves of the sentiments expressed as to the character of the late ADDISON GARDINER. He has worthily filled many of the highest offices in the State, and ceased to be so employed only by his own desire. Engaged in the public service at a time when his associates were among the most distinguished for learning and ability, he was always regarded as the peer of any. It was his peculiar distinction that he should have maintained for so long a period his seclusion from public affairs in the face of the urgent demands often made by the people for his return. It is now over a quarter of a century since I had the honor of making Judge GARDINER's acquaintance, and although he was then in the possession of unclouded and unimpaired mental and physical power, he had announced his permanent retirement from all public employment. He was much engaged in the latter part of his life in hearing references in the city of his residence, and his services were so urgently demanded in that capacity that he could not well avoid the employment. His calm judicial temper, combined with great integrity, learning and common sense, made

him almost invaluable in the performance of the duties of a judicial arbiter, and enabled him to give almost universal satisfaction in the settlement of legal controversies. The high position held by him in public estimation, as well as his position as a member of the original Court of Appeals, render it eminently proper that the mournful occasion of his death should be commemorated in the records of this court.

The clerk will enter a memorandum of these proceedings in the minutes of the court."

The court thereupon adjourned.

CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING JANUARY 16, 1883.

In the Matter of the Application of the SYRACUSE, CHENANGO
AND NEW YORK RAILROAD COMPANY et al.

Under the provision of the Revised Statutes (1 R. S. 603, § 5), authorizing any person who " may be aggrieved by or may complain of any election" of directors of a corporation to make application to the Supreme Court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain, may institute the proceedings.

Where therefore an application was made under said provision, for a new election, by one who was not a stock-holder at the time of the election complained of, but who subsequently received a certificate of stock from one who took part therein ; *held*, that the petitioner did not occupy a position authorizing the interposition of the court in his behalf ; that even if it be true, as to which *quærs*, that an illegal election must be complained of and set aside, in order to enable the court to compel an election, when the officers of the corporation omit to call a meeting of stock-holders to elect a new board of directors, the complaint may only be entertained when made by some aggrieved party who is not himself the author of the wrong complained of.

(Argued June 18, 1882 ; decided January 16, 1883.)

APPEAL, from order of the General Term of the Supreme Court, in the fourth judicial department, made April 8, 1882,
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which affirmed an order of Special Term directing a new election of directors of the Syracuse, Chenango and New York Railroad Company.

The material facts are stated in the opinion.

Martin A. Knapp, Irving G. Vann, & Geo. F. Comstock for appellants. In a proceeding under 1 Revised Statutes, 603, section 5, no one can be heard except a party who presents and names himself as having a grievance, cause or ground of proceeding. (19 Wend. 136.) The just policy of the law forbids that any man shall be heard for relief against any unlawful or fraudulent contract, act or device of his own. (*Nellis v. Clark*, 20 Wend. 24.) The petition of Lewis should have been denied because it was not his petition, but was a fraud and deception practiced upon the court in his name, by Burt & Howlett, the real parties. (*Waterbury v. Express Co.*, 50 Barb. 168; *Forest v. Manchester Co.*, 7 Jur. [N. S.] 887; *Burt v. British Ins. Co.*, 5 id. 612.)

E. W. Paige for respondent. A corporation can be dissolved only at the suit of the sovereign. (*Denike v. N. Y. & R. L. C. Co.*, 80 N. Y. 599.) The proceeding is properly brought by and in the name of the corporation. (*Matter of Pioneer Paper Co.*, 36 How. Pr. 111, 112.)

RAPALLO, J. Although the name of the corporation is used as one of the applicants in this matter, the opposing papers show clearly that it is so used without authority, and that George Lewis, Jr., is in fact the only applicant.

The statute (1 R. S. 603, § 5) under which the application is made, authorizes the proceeding to be instituted by any person, or persons, or body corporate that may "be aggrieved by, or complain of" any election. This does not mean that any person whosoever who chooses to make a complaint may institute the proceeding, but it must be some person whose rights have been infringed, and who is justly entitled to complain.

Opinion of the Court, per RAPALLO, J.

We do not think that the applicant Lewis occupies this position. The pretended election, which was set aside by the order appealed from, took place on the 6th day of May, 1881. That was the day appointed by the by-laws of the company for holding the annual election of directors; but the company being then in the hands of a receiver, no preparation had been made for holding an election, and no notice thereof had been given. On the day last named, William L. Burt and a Mr. Howlett, two of the stockholders of the company, met at the office of the receiver, during his absence, without any previous notice of any meeting of stockholders, and pretended to hold the election in question. The outstanding stock of the company consisted of about eighty thousand shares, of \$10 each. Mr. Burt was the holder of one share of \$10, and Mr. Howlett was the holder of 50 shares of \$10 each, on the books of the company. They assumed to organize themselves into a stockholders' meeting, Mr. Howlett being made chairman on motion of Mr. Burt, and Mr. Burt being made secretary on motion of Mr. Howlett, no other stockholders taking part in the proceedings. They assumed to appoint three persons as inspectors, and Mr. Burt voted on his one share, and Howlett on his fifty shares, for thirteen persons as directors, and the so-called inspectors thereupon made a certificate that the persons so voted for had been duly elected directors of the company. At this time the applicant Lewis was not in any form a stockholder of the company, nor has he since become a stockholder on its books, but soon after the 6th of May, 1881, and before the institution of this proceeding, the counsel for Burt and Howlett took to Lewis a certificate for twenty-one shares of \$10 each, which Howlett had bought at the request of Burt, and delivered such certificate to Lewis for money paid. This certificate is the sole foundation upon which Lewis asked the interposition of the court, to have said sham election set aside, and a new election of directors held under the direction of the court.

The application was opposed by the appellants, who were the directors in office at the time of the sham election, and

some of whom are large stockholders and bondholders of the company. They concede the invalidity of the pretended election of May 6, 1881, but oppose the ordering of a new election. The contest lying back of the present proceeding appears to have been whether the railroad and property of the company should be sold by the receiver, in which case it is claimed that a large sum could be realized therefor, or whether they should pass under the control of parties who had acquired a majority of the stock at merely nominal prices, and who were alleged to hold the same in the interest of a combination of other companies, with a view of procuring a transfer of the said railroad and property to the combination, on such terms that the interests of those who opposed such a transfer would be sacrificed.

Without entering into the merits of that controversy, we are of opinion that the petitioner did not present himself before the court in such a light as to justify its interposition in his behalf. He was not a stockholder or an elector; and if it be claimed that he represents those from whom he acquired his certificate of stock, the answer is that they are the very parties who committed the wrong which the court was asked to redress. It is said that the object of this proceeding is not simply to set aside the pretended election of May, 1881, but to obtain an election of directors, none having been held for several years, and that the statute (1 R. S. 603) authorizes a new election only when an illegal election has been set aside, and on this ground the order is sought to be sustained. We are not willing to concede that the law is so defective that the directors of a corporation may perpetuate themselves in office by simply omitting or causing the officers of the company to omit to call the necessary meeting of stockholders to elect a new board, and that there is no remedy in such a case unless an illegal election is held. But if it were true that an illegal election must be complained of and set aside, in order to enable the court to compel an election, the complaint should be entertained only when made by some aggrieved party who is not himself the author of the wrong complained of, and we

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cannot sanction the device here resorted to, of holding a sham election and then applying on behalf of the very parties who conducted it, to set aside their own illegal proceeding.

The orders of the General and Special Terms should be reversed, and application denied, with costs to be paid by the petitioner Lewis.

All concur.

Ordered accordingly

JOSEPH BORK, Plaintiff in error, v. THE PEOPLE OF THE STATE OF NEW YORK, Defendant in error.

Where the doing of any one of several things constitutes an indictable offense an indictment may in a single count group them together and charge the accused with having committed them all, and a conviction may be had on proof of the commission of any one of the acts charged, without proof as to the others.

The act of 1875 (Chap. 19, Laws of 1875), "to provide more effectually for the punishment of speculation and other wrongs affecting public moneys, and rights of property," applies as well to cases where the offender is an officer, agent or servant, having the custody of funds or property charged to have been misappropriated, or owing a special duty in relation thereto, as to a private individual having no official or confidential relation to the State or municipality defrauded.

The legislature has power to provide by an independent statute, like the one referred to, that certain acts of embezzlement, punishable by the existing law, shall constitute a distinct offense, and to affix a severer punishment than that provided by the general law for that class of offenses.

In an indictment under said statute for the unlawful conversion of property, or funds belonging to a municipal corporation by an officer thereof, it is not necessary to aver the fiduciary character of the accused.

This is a fact, however, proper to be proved on the trial.

Negotiable bonds of a municipal corporation, complete in form and capable of becoming effective instruments in the hands of a *bona fide* holder are although unissued, "property" within the meaning of said act.

People v. Loomis (4 Denio, 380), distinguished.

On the trial of an indictment under said act, it appeared that the prisoner who was treasurer of the city of Buffalo, as such, received for sale, in accordance with the usual custom, certain negotiable bonds of the city, which the common council had authorized to be issued and sold for city

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purposes; these he put into the hands of a broker with directions to sell and credit the proceeds to a firm of which the prisoner was a member, which was done. Said firm was at the time indebted to the broker in a sum exceeding the sum realized from the sale of the bonds. No entry of the sale was made in any manner in the treasurer's books. The indictment charged that the accused "feloniously, wickedly and wrongfully did obtain and receive * * * and convert" to his own use said bonds. *Held*, that the transaction was a conversion of the bonds, and, assuming that the prisoner did not wrongfully receive or obtain them, his wrongful conversion thereof was sufficient to sustain a conviction.

The indictment gave a full description of the bonds, *held* that it was not defective because of the omission of an averment, that the bonds were held on behalf of "any public or governmental interest," as this was necessarily implied in the description.

Also *held*, that an averment that the bonds were negotiable was unnecessary.

(Argued October 9, 1882; decided January 16, 1883.)

ERROR to the General Term of the Supreme Court, in the fourth judicial department, to review judgment which affirmed a judgment of the Court of Oyer and Terminer in and for the county of Erie, entered upon a verdict convicting the plaintiff in error of the offense hereinafter stated.

The indictment under which the defendant was convicted, after averring in the first count the incorporation of the city of Buffalo, and that during the time mentioned in the indictment, Thomas R. Clinton was comptroller of the city, and as such, held for and on behalf of the city, two hundred unpaid and unsatisfied bonds, known as city and county hall bonds, of the denomination and value of \$1,000 each, the "credits, funds and property" of the city, proceeds in the charging part to aver and charge that on the first day of October, 1875, at Buffalo, the defendant Bork, "with intent to defraud the said city of Buffalo, etc., then and there feloniously, wickedly and wrongfully did obtain and receive from Thomas R. Clinton, such officer as aforesaid, etc., and did convert to his said Joseph Bork's own use and dispose of one hundred bonds of the city of Buffalo, * * * issued by the said city of Buffalo, * * * of the kind known as city and county hall bonds, in and by each of which bonds the said city of Buffalo promised and

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agreed to pay the sum of \$1,000, with interest thereon, each being dated, * * * and of the denomination and value of \$1,000 each, a further and more particular and accurate description of which is to the jurors unknown, * * * of the funds, credits and property of the said city of Buffalo, etc., then and there so as aforesaid, held by said Thomas R. Clinton, as such officer, * * * officially for and on behalf of said city, contrary to the form of the statute." The second and third counts are founded upon the same transaction set forth in the first count. It was found on the trial that Mr. Bork was treasurer of the city of Buffalo, from January 1, 1872, to January 1, 1876, having been elected treasurer for two successive terms of two years each. Sometime in December, 1875, it was discovered that Bork was a defaulter to the city, and an investigation was instituted, in the course of which it was ascertained that his defalcation amounted to about the sum of \$475,000. When the defalcation commenced, does not definitely appear, but it was shown that it was as early as October, 1873. The money misappropriated by Bork was derived from taxes, the sale of city bonds, and other sources of municipal revenue, and was to a great extent turned over, or deposited by him with the firm of Lyon & Co., a firm engaged in the real estate and banking business in the city of Buffalo, of which Bork was a member, and was used in their business. The firm of Lyon & Co. had no capital, and when the defalcation of Bork was discovered, it was found to be insolvent. The material facts in respect to the city and county hall bonds mentioned in the indictment, and their disposition by Bork, are as follows: By the act chap. 680, Laws of 1871, § 14 it was made the duty of the mayor and comptroller of the city of Buffalo, to borrow upon the faith and credit of the city, the money necessary to pay its proportion of the expense of erecting a public building in the city of Buffalo, to be known as the city and county hall, for the use of the county of Erie and the city of Buffalo, and to issue interest-bearing bonds of the city therefor, payable not more than fifty years, nor less than twenty years from their date, which bonds were to be registered in the office of the comp-

troller, and to be negotiated by the mayor and comptroller as fast as the moneys should be required by the building commissioners appointed by the act, on the best attainable terms, but at not less than their par value, the moneys received therefor to be deposited with the treasurer of the city, who was directed to keep a separate account thereof, and to pay therefrom, upon the order of said commissioners, from time to time, the amounts required to pay the city's proportion of the expenditures authorized by the act. By resolution of the common council of the city, adopted Aug. 23, 1875, approved by the mayor, the mayor and comptroller were authorized and directed to issue the bonds of the city to the amount of \$125,000, under the act of 1871, the bonds to bear date September 1, 1875, and to negotiate the bonds, and deposit the proceeds with the city treasurer, to the credit of the city and county hall building fund. The mayor and comptroller thereupon caused to be printed one hundred and twenty-five bonds of \$1,000 each, with interest coupons attached, dated September 1, 1875, purporting to be bonds of the city of Buffalo, authorized by said chapter 680, of the Laws of 1871, payable to bearer, the principal at thirty-two years. The bonds were duly executed by the mayor and comptroller, under the seal of the city, and deposited with the comptroller. The comptroller on or about the 20th day of September, 1875, delivered to Bork seventy-five of the bonds, to be sold by him on account of the city. Bork sent them through a bank in Buffalo to a bank in the city of New York, subject to his order. He went to New York the same day, received the bonds from the bank there and put them into the hands of one Moran, a broker in that city, the correspondent of Lyon & Co., with directions to sell the bonds and credit the proceeds of sale of twelve of the bonds to Lyon & Co., on their account with Moran, and to deposit the proceeds of sale of the remaining sixty-three bonds in the Bank of New York, to the credit of the Bank of Commerce of Buffalo, one of the deposit banks designated by the common council of Buffalo for the deposit of city funds. The bonds were sold by Moran, who deposited the proceeds as directed, by crediting the ac-

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count of Lyon & Co. \$12,768.00, the proceeds of twelve of the bonds, and depositing to the credit of the Bank of Commerce \$67,252.50, the proceeds of the remaining sixty-three bonds, which sum the Bank of Commerce, on being advised, credited to the account of Bork as treasurer. Lyon & Co., at the time of this transaction, were indebted to Moran on overdrafts in a sum exceeding the credit to their account from the sale of the bonds. Bork made no entry in the treasurer's books of the sale of the bonds. He neither charged himself with the bonds nor credited the city with the proceeds. The credit in the Bank of Commerce did not disclose the source from which it was derived. The delivery of the bonds by the comptroller to Bork for sale was in accordance with the general custom in respect to bonds issued by the city during the incumbency of Bork. The city during that period had issued bonds to the amount of one or two millions of dollars for various purposes, and a large part of them had been negotiated by Bork, they having been placed in the hands of the comptroller for that purpose.

George F. Comstock for plaintiff in error. The offense described in the indictment was not proved, unless it was shown that the plaintiff in error feloniously or wrongfully obtained the bonds. (*Comm. v. Simpson*, 9 Metc. 138.) Embezzlement is a distinct offense, predicated on fiduciary relations; and under an indictment for larceny in a single count, a conviction thereon could not be sustained by proving an embezzlement in a trust relation, although the offenses were similar, and the punishment of both the same. (2 Bishop on Crim. Law [3d ed.], §§ 327, 332; *People v. Dowling*, 84 N. Y. 486; *Coleman v. The People*, 55 id. 61.) If the thing which is the subject of the alleged theft was freely delivered to the accused, if the intelligent will of the owner goes with such delivery and is not cheated into assent by some special artifice and fraud, no proof of the subsequent conversion or misappropriation of the thing so delivered can be received to establish the crime of larceny. (2 Whart. 1779, 1790, 1935; 3 Chit. Crim. Law, 918, 919; 4 Jac. Law Dic.,

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"Larceny, 75, marginal 226; Archibald, 1185; Russ. & M. C. C. 160; *Williams v. State*, 44 Ala. 396; 2 East's P. C. 694; 1 Hale's P. C. 505.) The indictment sets forth no criminal offense, because the subject is stated to be the bonds of the city of Buffalo, in the official possession of the comptroller, which means unissued bonds, whether negotiable or not. The conclusion is only the more certain, negotiability not being averred. (*People v. Loomis*, 4 Den. 380.) The motion to quash should have been granted on the ground that nothing in the indictment shows that the bonds alleged to have been feloniously obtained and received were authorized and valid instruments. (Dillon on Mun. Corp. 81.) It is a fundamental requirement of the statute that whatever thing may be the subject of the crime, it must be held or owned "for or on behalf of a public or governing interest." (*Wood v. People*, 53 N. Y. 511; *People v. Allen*, 5 Den. 76; *Lohman v. People*, N. Y. 380; *People v. Payne*, 3 Den. 88.)

Edward W. Hatch, district attorney, for defendant in error. A city, being a municipal corporation, is a public and governmental interest, subject to the control of the legislature. (2 Burrill's Law Dict. 732.; 2 Kent's Com. 275; *People v. Morris*, 13 Wend. 325; *Roosevelt v. Draper*, 23 N. Y. 318-324; *Gamble v. Village of Watkins*, 7 Hun, 448; *Hodges v. City of Buffalo*, 2 Den. 110; *Leonard v. City of Brooklyn*, 71 N. Y. 498; *Lowber v. Mayor, etc., of N. Y.*, 5 Abb. Pr. 325; *LeCouteulx v. City of Buffalo*, 33 N. Y. 333; *People v. Ingersoll*, 58 id. 1; *Brinkerhoff v. Board of Education*, 37 How. Pr. 449; *Sillcocks v. Mayor*, 11 Hun, 431-432; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65-74; *Guest v. City of Brooklyn*, 8 Hun, 97; *Brooklyn Park Commrs. v. Armstrong*, 45 N. Y. 234; *People, ex rel. Hayden, v. City of Rochester*, 50 id. 525; *Matter of Meade*, 74 id. 216; *Merrweather v. Garrett*, 102 U. S. 472-511; *Vanderwerker v. People*, 5 Wend. 530; *People v. Broese*, 7 Cow. 429; *Farley v. McConnell*, 7 Lans. 428; *Wood v. People*, 1 Hun, 381; *Howard v. Moot*, 64 N. Y. 264-271; S. C., 2 Hun, 475; *Pat-*

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ten v. N. Y. El. R. R. Co., 3 Abb. [N. C.] 306-310; *Foundleroy v. Hanible*, 1 Dill. 118; *Stier v. City of Oskaloosa*, 41 Iowa, 388; *Village of Winisook v. Gokey*, 49 Vt. 282; *Board of Commrs. v. Spilster*, 13 Ind. 235; *State v. Power*, 25 Conn. 48; *Hill v. Bacon*, 53 Ill. 477; *Gilbert v. Moline*, 19 Iowa, 319; *Goodman v. Appleton*, 22 Me. 453; *LaGrange v. Chapman*, 11 Mich. 499; *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31; *Merchants' Nat. Bk. v. Hall*, 338; *Slater v. Jewett*, 85 id. 61-68.) It is the citizens of a city and not its officers who constitute the corporation. (*Louber v. Mayor, etc., of N. Y.*, 5 Abb. 325.) The description in the indictment of the bonds converted was sufficient. (*Haggarty v. City of Brooklyn*, decided by Com. of Appeals in September, 1874; *Casey v. N. Y. C. R. R. Co.*, 6 Abb. [N. C.], 104; *Armstrong v. Cummings*, 20 Hun, 313-314; *Hartwoell v. Root*, 19 Johns. 345; *Nelson v. Eaton*, 26 N. Y. 410; *Arent v. Squire*, 1 Daley, 347; *People v. Carpenter*, 24 N. Y. 86; *Williams v. W. U. Tel. Co.*, 9 Abb. [N. C.] 437-447; *Chaut. Co. Bk. v. Risley*, 19 N. Y. 369; *DeGroff v. Am. Linen Thread Co.*, 21 id. 124.) An indictment is sufficient which states the substance of the offense with the circumstances necessary to render it intelligible and inform the defendant of the allegations against him. (*Pontius v. People*, 82 N. Y. 339, 345; *People v. Phelps*, 5 Wend. 9; *People v. Warner*, id. 271; *Briggs v. People*, 36 N. Y. 431, 436; *People v. Rynders*, 12 Wend. 425; *People v. Charles*, 3 Den. 212; 1 Comst. 180; *People v. Ball*, 42 Barb. 324; *People v. Phelps*, 72 N. Y. 334; *Tulby v. People*, 67 id. 15; *Schrumpf v. People*, 14 Hun, 10; *Gibson v. People*, 5 id. 543-544.) The employment in an indictment of a word which *ex vi termini* imports a material fact not expressly averred is sufficient. (*Page v. People*, 3 Abb. on App. 439; 6 Park. Crim. R. 683.) The term "bond" *ex vi termini* imports a sealed instrument. (1 Burrill's Law Dict. 155; *Cauley v. Deeren*, Harp. [S. C.] 434; *Taylor v. Glaser*, 2 S. & R. 502; *Denton v. Adams*, 6 Vt. 40; *Deming v. Bullitt*, 1 Blackf. [Ind.] 241; *Skinner v. McCarthy*, 2 Port. [Ala.] 19; *Harmon*

v. *Harmon*, 1 Baldw. 129; *State v. Thomson*, 49 Mo. 188; *People v. Wiley*, 3 Hill, 194.) Facts, and not evidence of facts, should be pleaded. (*Knowles v. Gee*, 4 How. Pr. R. 317; *Kelley v. Brensing*, 33 Barb. 123; *Tuttle v. People*, 36 N. Y. 431, 436.) The indictment is good in fact, as an indictment for grand larceny. (*Tully v. People*, 67 N. Y. 15; *Phelps v. People*, 6 Hun, 401; *Phelps v. People*, 72 N. Y. 334.) The element of value is not of the essence of the offense created by the statute. It is sufficient even if the actual value be of the most trifling character, or even though there may be no appreciable or market value. (2 R. S. 702-703 [marg.], §§ 33, 34; [6th ed.] 3 R. S. 985, §§ 55, 56; 2 R. S. 678, § 60 [marg.] 3 id. [6th ed.] 952, § 75; *People v. Campbell*, 4 Park Crim. 386; *Mulally v. The People*, 86 N. Y. 365; *People v. Phelps*, 72 id. 334; *People v. Wiley*, 3 Hill. 194; *Commonwealth v. Sand*, 7 Metc. [Mass.] 475-476; *U. S. v. Moulton*, 5 Mason, 537-551; *Rex v. Clark*, Russ. & Ry. 181; *Reg. v. Morris*, 9 Carr. & P. 347.) It was not necessary that there should be a felonious obtaining or receiving. (2 Burrill's Law Dict. 840; 3 Blackstone, 2; 4 id. 1; 3 Steph. Com. 350; *Foster v. People*, 50 N. Y. 598; *People v. Park*, 41 id. 21; *Shay v. People*, 22 id. 317; *Tulle v. People*, 67 id. 15; *People v. McDonald*, 43 id. 61-64.) The facts and circumstances proved of the prisoner's omission to charge himself with the bonds, or to account for the manner in which he obtained the moneys with which he credited himself as treasurer, furnished further evidence of motive, intent and fraudulent purpose. (*People v. Call*, 1 Denio, 120; *People v. McDonald*, 43 N. Y. 61; Russell on Crimes, 191, 64, 65.)

ANDREWS, Ch. J. The indictment under which the conviction was had, which is now the subject of review, was found under the act of February 17, 1875 (Chap. 19), entitled "An act to provide more effectually for the punishment of speculation and other wrongs affecting public moneys and rights of property." The first section, which defines the offense of which the defendant was convicted, is as follows: "§ 1. Every

person who, with intent to defraud, shall wrongfully obtain, receive, convert, pay out, or dispose of, or who with like intent, by willfully paying, allowing, or auditing, any false or unjust claim, or in any other manner or way whatever shall aid or abet any other in wrongfully obtaining, receiving, converting, paying out, or disposing of, any money, fund, credits, or property, held or owned by this State, or held or owned officially or otherwise, for or on behalf of any public or governmental interest, by any municipal or other public corporation, board, officer, agency, or agent of any city, county, town, village, or civil division, sub-division, department, or portion of this State, shall, upon conviction of such offense, be punished by imprisonment in a State prison for a term not less than three years, nor more than ten years, or by a fine not exceeding five times the loss resulting from the fraudulent act or acts which he shall have so committed, aided or abetted, to be ascertained as hereinafter mentioned, or by both such fine and imprisonment."

The indictment charges in the conjunctive that the defendant, with intent to defraud, did feloniously and wrongfully obtain, receive, convert and dispose of the bonds mentioned. The statute is pointed against the criminal misapplication of public funds or property. The offense may be committed in any one of the several ways mentioned, that is, by receiving, obtaining, converting, etc., such funds or property wrongfully, with intent to defraud. It was not necessary to prove that the defendant did all the specific acts charged in the indictment, to justify a conviction. It was sufficient to prove that he did any one of the acts constituting the offense. Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together, and charge the defendant to have committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others. (*People v. Davis*, 56 N. Y. 95.) The question whether the proof established a wrongful receiving by Bork of the city and county hall bonds, as charged in the indictment, was fully

argued by the respective counsel. We do not deem it necessary to determine this question. There is much plausibility in the suggestion that as the bonds were delivered to Bork by the comptroller voluntarily, and according to the established course in respect to the bonds of the city intended for negotiation, and without any request by Bork, or any fraud or artifice on his part to induce the delivery, he could not be deemed to have received or obtained them wrongfully. The fact that Bork was then a defaulter, and that he misappropriated a portion of the bonds soon after they came to his possession, is claimed, on the other hand, to furnish an inference that when he received them he intended to defraud the city, and that if such intention existed, he received them wrongfully within the statute. Whatever may be the correct view of this question, it is unnecessary to decide, for the reason that assuming, as the defendant's counsel contends, that Bork did not wrongfully receive or obtain the bonds, his subsequent delivery of the bonds to the broker in New York, for sale, accompanied with a direction to credit Lyon & Co. with the proceeds of sale of twelve of the bonds, was a clear conversion of these bonds, it being his intention, as the jury have found, to appropriate them to the use of his firm.

The bonds were delivered by the comptroller to Bork for a specific purpose, viz.: for sale in the city of New York for the city of Buffalo. The authority conferred doubtless included an authority to sell them through a broker, according to the custom. But the direction to sell the bonds for and on behalf of the city was inseparable from the authority to sell, and a sale for his own benefit was not a sale within the power. His direction to sell the bonds and credit the proceeds to Lyon & Co. was the exercise of a dominion over them, inconsistent with the right of the true owner, and was a conversion of the bonds. Whether the indictment charging Bork with the conversion of the proceeds might not have been sustained is not material. That the transaction may be treated as a conversion of the bonds is plain. The principle was decided in *Com. v. Butterick* (100 Mass. 1), where it was held that an

indictment for the embezzlement of a promissory note, taken by the defendant to be discounted at a bank for another person, was supported by proof that the defendant procured the note to be discounted at the same bank, on his own account, and the proceeds placed to his own credit. We are, therefore, of opinion that the proof sustains the conviction on the merits, unless the learned counsel is right in the contention that assuming a conversion of the bonds, still the case is not within the statute.

Bork, at the time of this transaction, was treasurer of the city of Buffalo. It is insisted that he received the bonds by virtue of his office as treasurer, or, if not strictly as an official trust, at least as the servant or agent of the city, and that his conversion of them constituted the crime of embezzlement. (2 Rev. St. 678, §§ 59, 60; Laws of 1874, chap. 207.) It is further claimed that the statute of 1875 was not intended to apply to the offense of embezzlement, already defined, and punishable by existing laws, but was intended to make something criminal which was not criminal before, and that this new offense, while neither larceny nor embezzlement, was something else of which the ingredient to defraud the public was the essential element, but which was not before the subject of indictment. This argument overlooks, we think, the purpose and language of the statute in question. We have no doubt that frauds by private persons, holding no fiduciary relations to the State, or a municipality, are within the purview of the act. But, we think, the act applies to cases within its general language, whether the offender is an officer, agent or servant, having the custody of the funds charged to have been misappropriated, or owing a special duty in relation thereto, or a private individual having no official or other confidential relation to the State or municipality defrauded by his act. It is a part of the public history of the time that when the act was passed public attention had been recently called to gross frauds committed by municipal officers, especially in the city of New York, in the abstraction, diversion and embezzlement of public funds and property. The malfeasance of officials in-

trusted with public means and property was the danger especially apprehended. Without their direct act or connivance it would be difficult to accomplish the frauds against which the statute was aimed. It was one of the purposes of the act, as the word *peculation* in the title indicates, and perhaps its primary purpose, to afford additional security against the betrayal of official trusts, by imposing severer punishment for embezzlements or other frauds when committed by public officers in misapplying public property, than was provided by existing laws. The language of the statute, defining who may be offenders, is as broad and comprehensive as possible. "Every person," is the language used. The acts constituting the offense, include the wrongful *paying* out of public funds, and the willful paying, allowing or auditing an unjust claim, with intent to defraud. These particular acts could ordinarily only be committed by officers or agents having a duty to perform in respect to the public funds, or clothed with a public trust in the adjustment of claims. Moreover, the second section of the act is framed to meet the case of a wrongful transfer by public officers of deposits in banks, of any credit, claim, chose in action, or right or demand belonging to the public, by which the public right shall be defeated or impaired, and declares that such transfer shall be deemed a conversion within the act. And, finally, to put it beyond doubt that offenses punishable by existing laws were not excluded from the purview of the act, it is declared in the third section, that if on any trial (under the act) "it shall appear that the acts of which the defendant was guilty constitute any other crime, he shall not by reason thereof be entitled to an acquittal; but after such trial and judgment he shall not be liable to prosecution for such other crime." It was certainly competent for the legislature to provide, by an independent statute, that certain acts of embezzlement, punishable by the existing statutes, should constitute a distinct offense, and affix a severer punishment than was provided by the general law relating to that class of offenses. The effect of the construction of the act of 1875, claimed by the defendant, viz.: that it applies to frauds by private persons only, would be to subject

them to a much greater punishment than is visited upon faithless officials guilty of embezzlement, a crime of greater turpitude than the fraud of a private person, involving as it does, in addition to the element of fraud, a breach of public trust, and it is difficult to suppose that such discrimination was intended. We are of opinion, therefore, that, assuming that the facts proved constitute the crime of embezzlement, the indictment was properly framed and the conviction legally had, under the statute of 1875. It was unnecessary to aver in the indictment the fiduciary relation of the defendant. In an indictment for embezzlement, under the statute of embezzlement, such an averment is essential (*Com. v. Simpson*, 9 Met. 138), because the existence of that relation is an essential element of the crime. Under the statute of 1875 that is not the case, as the offense may be committed either by an officer, servant or agent, or by a person occupying no such position. The evidence that Bork was in fact treasurer was not, however, objectionable. It was one of the facts of the case, and tended to illustrate and explain other pertinent facts.

The further point was taken on the trial, and is urged on the appeal that the bonds, not having been issued when they were received by Bork, had no intrinsic value, and were not "money, funds, credits or property" of the city of Buffalo, within the descriptive words of the statute. It is incontestable that they did not become valid obligations of the city of Buffalo, until they had an inception by the transfer and sale. But they were, when received by Bork, complete in form and capable of becoming effective instruments by delivery to a *bona fide* holder. We think they were properly described as bonds in the indictment, and that they were, though unissued, property within the meaning of the statute of 1875. In *People v. Wiley* (3 Hill, 194) the indictment charged the receiving by the defendant of "ten promissory notes, usually called bank notes, of the value," etc., knowing them to have been stolen. The proof was that the bills were stolen from the bank whose bills they were, and which though complete in form had never been issued. The court sustained the conviction. In

Commonwealth v. Rand (7 Met. 475), the indictment was for the larceny of certain bank bills which had been redeemed by the bank and were in the hands of its agent at the time of the theft. The statute of Massachusetts specified bank bills as the subject of larceny, and the court held that the indictment was sufficient. The counsel for the defendant refers to the case of *The People v. Loomis* (4 Denio, 380) in which it was held that stealing a receipt from the hands of the party whose act it is, it never having taken effect by delivery, is not larceny. The stealing of personal property, and not of personal goods, as at common law, is by the Revised Statutes (2 Rev. St., 679, § 63) larceny, and the words personal property, as used in the chapter containing the section above referred to, are declared to mean "goods, chattels, effects, evidence of rights in action, and all written instruments by which any pecuniary obligation, or any right or title of property, real or personal, should be created, acknowledged transferred, increased, defeated, discharged or diminished." An unissued receipt is not within the descriptive terms of this statute, and if stolen from the person who signed it, it neither defeats, discharges, nor diminishes any right. The only possible consequence is to subject the party signing it to inconvenience, in showing the circumstances under which the possession was obtained, but this element does not make the transaction larceny within the statute. The learned judge who delivered the opinion in *People v. Loomis* justifies his conclusion, by reference to some early English cases, among others *Walsh's case* (R. & R. Cr. Cas. 215), which arose under Statute 2, George II, chapter 25, in which it was held that a check signed, but not delivered, while it remains in the hands of the owner, is not the subject of larceny. By that statute the stealing of certain written securities was made larceny, but the statute declared that the money due thereon, or secured thereby and remaining unsatisfied," should be taken as the value of the securities stolen, and the court construed the statute as referring to securities which were valid outstanding securities, and which were therefore presumptively of the value of the sum expressed therein, which could not be true of unissued instruments. In

the case of *Rex v. Metcalf* (1 Moody's Cr. Cas. 433), which arose under Statute 7 and 8, George IV, chapter 29 § 5 (which in describing the instruments which are subjects of larceny, uses very nearly the same language as Statute 2, George II), it appeared that the prisoner who was occasionally employed by the prosecutors, having received from them a check on their bankers, payable to a creditor for the purpose of giving it to the creditor, appropriated it to his own use, and it was held by the judges on a case reserved to be a larceny of the check. The same point was ruled in *Reg. v. Heath* (2 Moody's Cr. Cas. 33). The case of *People v. Loomis* was clearly not a case of larceny within the Revised Statutes. It does not control the question now before us, which depends on the construction of the words "money, funds, credits or property," in the act of 1875. We think the cases of *People v. Wiley*, and *Commonwealth v. Rand*, *supra*, support the conclusion we have reached on this branch of the case.

There was no error in admitting in evidence the affidavit of Bork, made in January 1876. It tended strongly to establish his fraudulent purpose in directing the proceeds of the twelve bonds to be passed to the credit of Lyon & Co.

The point that the bonds were not averred in the indictment to have been held on behalf of "any public or governmental interest," is not tenable. The bonds of a city which can only be paid by taxation, if property in the corporation, under the statute of 1875, although unissued, as we have held, were public property, and were mainly held for a "public or governmental interest," whatever this somewhat obscure language may mean, and it was not necessary to aver what is necessarily implied, in the description in the indictment. So also it was unnecessary that the indictment should allege that the bonds were negotiable. This was matter of description. The indictment alleges that the bonds were the property of the city, and if the truth of this averment depended upon their negotiable or non-negotiable character, the question could be made on the trial, and could not be raised by demurrer, or on motion in arrest of judgment.

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We find no error in the record, and the conviction should therefore be affirmed.

All concur except RAPALLO, J., absent.

Judgment affirmed.

KERSEY COATES, as Assignee, etc., Respondent v. THE FIRST
NATIONAL BANK OF EMPORIA et al., Appellants.

On August 1, 1878, the M. Bank of Kansas City had a balance to its credit in the hands of D., L. & Co., its agents and correspondents in the city of New York. M. was a depositor in said bank, and it was on that day indebted to him in the sum of \$5,000. M. was also a depositor with D., L. & Co. It was the practice of the parties, founded on a prior agreement, for the M. Bank, at the request of M., to provide funds for his account with D., L. & Co., by ordering the latter to transfer from its account to that of M. such sums as it was directed by M. to remit. In accordance with this agreement and custom M., on July 30, 1878, wrote to the M. Bank to remit \$5,000 to D., L. & Co. for his credit and charge his account with the same. This letter was received by the M. Bank, it thereupon charged M. with the \$5,000 and credited itself therewith and also credited D., L. & Co. with the same amount, and on August first mailed to M. a letter stating it had remitted for his credit the sum required. On the same day it sent to D., L. & Co. a paper signed by its proper officers directing that firm to "pay to the order of credit, M. \$5,000." A formal letter of advice was also sent to D., L. & Co. in the same envelope. On August 3, the M. Bank assigned all its property to plaintiff for the benefit of creditors. On August 5, plaintiff notified D., L. & Co. by telegram of the assignment, which notice was received by that firm about two hours before receipt of the letter of advice and order. In September plaintiff demanded payment of the apparent balance, which D., L. & Co. refused to pay over. In an action to recover the same, *held*, that the transaction, as between the parties, amounted to an assignment to M. as of August 1, of \$5,000 of the indebtedness of D., L. & Co. to the M. Bank; that it was not essential to a valid transfer that D., L. & Co. should be apprised of it; that plaintiff, as voluntary assignee, occupied no better position than his assignor; that the paper directing payment sent by the M. Bank to D., L. & Co. was not intended or delivered as a bill of exchange and was not a necessary act so far as title was concerned, but was effectual only as a voucher or notice of the rights of M.; and that the latter was entitled to the sum in question.

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Att'y-Gen'l v. C. L. Ins. Co. (71 N. Y. 825; 27 Am. Rep. 55), *Prince v. O. Bank Corp.* (L. R., 3 App. Cas. 825), distinguished.

Coates v. First Nat. B'k (15 J. & S. 322), reversed.

(Argued November 17, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York entered upon an order made the first Monday of March, 1881, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 15 J. & S. 322.)

The controversy came up on interpleader proceedings, directed in an action brought by Kersey Coates as assignee of the Mastin Bank against Robert W. Donnell, Leonidas M. Lawson and George E. Simpson, to recover a balance claimed to be in their hands, growing out of collections for, and deposits made with them, by the Mastin Bank in the course of its business of banking. The following are the material facts: The Mastin Bank is a corporation under the laws of the State of Missouri, and until its assignment to the plaintiff, transacted business at Kansas City in that State. On the third day of August, 1878, it assigned its entire property to the plaintiff in trust for the benefit of creditors. Before that time, and up to, and including August 5, 1878, the said Robert W. Donnell, Leonidas M. Lawson and George E. Simpson, bankers in New York city under the firm name of Donnell, Lawson & Co., were agents and correspondents of the Mastin Bank, and as appeared by their books were then indebted to it. On the fifth of August the plaintiff notified them by telegram of the assignment, and in September, demanded payment of the apparent balance; they refused, saying that the Emporia Bank and Jenkins W. Morris were entitled to it. He then commenced this action, and upon their application, the defendants were allowed to pay into court the money claimed, and have substituted in their place as defendants, the "First National Bank of Emporia," and Jenkins W. Morris, and others (who, having made default, need not be mentioned), and be thereupon discharged from liability to the plaintiff, or to either of these substituted defend-

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ants. This order was complied with, and the defendants, the "First National Bank of Emporia" and Jenkins W. Morris, answered, claiming the whole of said money, then amounting to \$10,023.89, upon these grounds, viz.: prior to, and on the first day of August aforesaid they were depositors in the Mastin Bank, and it was then indebted to each in the sum of \$5,000. They were also depositors with Donnell, Lawson & Co., and the practice between that firm and this bank and Morris was for the Mastin Bank at the request of the Emporia Bank, or Morris, to provide funds for their account and credit with Donnell, Lawson & Co., by ordering the latter to transfer from its account and credit to the credit of either of these defendants, as the case might be, such sums as the Mastin Bank was directed by its depositor to remit. This practice was founded on a prior agreement, and on the 30th of July, 1878, in accordance with it and the usual course of business between the parties, Morris, under the name of the "Salina Bank" (in which he did business), wrote the Mastin Bank to "remit \$5,000 to Donnell, Lawson & Co., New York, for our credit, and charge our account for the same." This was received by the Mastin Bank, and it then charged the Salina Bank \$5,000 at the same time crediting itself therewith as paid to the Salina Bank, and also crediting Donnell, Lawson & Co. the same amount, and charging itself in their account. On the first day of August the Mastin Bank wrote the Salina Bank, under that date, "your favor of the 30th received; we remit Donnell, Lawson & Co., New York, for your credit, \$5,000," the letter was mailed on the same day. A like course was pursued in regard to a remittance of \$5,000 requested by the Emporia Bank, under date of July 31. On the same day the Mastin Bank sent to Donnell, Lawson & Co., a paper signed by its proper officer, in these words: "\$5,000. Pay to the order of credit, the First National Bank of Emporia, Kansas, \$5,000," and another similar order, save in the name which read "J. W. Morris." A formal letter of advice to Donnell, Lawson & Co., as to each order, was placed in the same envelope. These papers reached that firm on the fifth day

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of August, and about two hours after the receipt of notice of the assignment to the plaintiff.

Rastus S. Ransom for appellants. A chose in action may be assigned by parol. (*Trescott v. Hull*, 17 Johns. 284; *Ford v. Stewart*, 19 id. 342; *Ressel v. Albetis*, 56 Barb. 362; *Dawson v. Cole*, 16 Johns. 54; *Sheridan v. Mayor*, 68 N. Y. 30; *Lawrence v. Fox*, 20 id. 268; *Els v. Finch*, 5 Johns. 194; 2 Mass. 86; 4 id. 508; 1 Dall. 139; 1 Bosw. & Pull. 447; 1 Johns. Ca. 51, 411; *Dawson v. Coles*, 16 Johns. 54.) The terms of this contract had been assented to by the bank and defendants, and were therefore binding upon them. (3 Johns. 534; 37 N. Y. 325; 19 id. 310; 48 id. 614; *Risley v. Phoenix Bk.*, 83 id. 318.) The letter was a valid assignment in law, the orders were but incidental. (*Young v. Second Ward Bk.*, 14 Rep. 448.) The orders amount to an equitable assignment. (*Hill v. Miller*, 76 N. Y. 32; 1 Parsons on N. & B. 14, [2d. ed.] 52; 1 Barb. 454; 16 Johns. 50; 19 id. 342-95; Voorhees' Code [8th ed.], 112, note 9; 68 N. Y. 30; *Ford v. Anglerodt*, 37 Mo. 53; *Mandeville v. Walsh*, 5 Wheat. 277; *Christmas v. Russell*, 14 Wall. 69; *McLoon v. Lingnist*, 4 Benedict, 9; *Walker v. Mauro*, 18 Mo. 564; *McLean v. Weidemeyner*, 25 id. 366; *Sealey v. Dugdale*, 34 id. 99; 24 id. 517; *Laughlin v. Fairbanks*, 8 id. 367; *Rogers v. Gaskell*, 58 id. 589; 2 Greenl. on Ev., § 109; *Sett v. Morris*, 4 Simmons, 607; Bispham's Eq. [2d. ed.] 221; *Yeates v. Graves*, 1 Vesey Jr. 279-280; *Biron v. Carvalho*, 4 M. & C. 702; *Munger v. Shannon*, 61 N. Y. 251, 256, 257; *Lovely v. Steward*, 25 id. 239; *Morton v. Naylor*, 1 Hill. 583.) The orders not being bills of exchange, an oral acceptance was good. (*McMenomy v. Ferrers*, 3 Johns. 82-83; *Hossack v. Rogers*, 6 Paige, 415; *Hall v. City of Buffalo*, 1 Keyes, 193; *Vreeland v. Blunt*, 6 Barb. 182; *Weston v. Barker*, 12 Johns. 276; *Cainfield v. Munger*, id. 346; 2 Story Eq. Juris., §§ 972, 1039, 1040, 1041, 1042, 1044, 1048, 1057.) These orders were but banker's checks, and in equity, as between drawer and defendants, are assignments or appropriations of so

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much of the fund, and the bank on which they were drawn is liable to the holder. (*McGrade v. German Savings B'k*, 4 Mo. App. 330, 401; *Price v. Bannister*, 3 Q. B. D. 569; *Morton v. Taylor*, 1 Hill, 583; *Bradley v. Root*, 5 Paige, 632; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Marshall v. Meech*, 51 N. Y. 140; *Alger v. Scott*, 54 id. 14; *Brown v. Mayor*, 48 Sup. Ct. 22; *Jones v. Mayor*, 47 Supr. Ct. 242; *Field v. Mayor*, 2 Seld. 179; *Risley v. Phoenix B'k*, 83 N. Y. 318.) The plaintiff took by the assignment to him the assets of the Mastin Bank, subject to all liens thereon, and equities existing in favor of the creditors of the bank. (1 Paige, 125; 11 id. 21; 3 Sandf. Ch. 333; 1 Barb. 486; 2 Story Eq. Juris., § 1228; *Mitford v. Mitford*, 9 Ves. 100; *Jewson v. Moulson*, 2 Aik. 417; *Worral v. Marlur*, 1 P. Will. 459; Mr. Cox's note; *Peak v. Lightoller*, 1 Madd. Ch. 346; *Grant v. Mills*, 2 Ves. & B. 309; *Chapman v. Tanner*, 1 Vernon, 267.) There is no difference between an assignment for the benefit of creditors under the statute and an assignment under the Bankrupt Law. (*Bayley v. Greenleaf*, 7 Wheat. 54, 55; *Green v. Demas*, 10 Humph. [Tenn.] 371; *Roberts v. Corbin & Co.*, 26 Iowa, 327; *Clark v. Mauran*, 3 Paige, 373; *Bradley v. Root*, 5 id. 632.) The assignment to plaintiff is void under the laws of this State. The defendants are not residents of this State nor of Missouri. (Wharton on Conflict of Laws, §§ 353, 348a; *Masshman v. Cain*, 34 Barb. 66; 7 Wall. U. S. 151.) An assignment made in another State will not be held valid when it conflicts with laws of the State where it is sought to be enforced. (Story's Conflict of Laws, § 344; *Bryan v. Bresbin*, 26 Mo. 423; *Kelly v. Crapo*, 45 N. Y. 94; *Holmes v. Remsen*, 20 Johns. 264.) Contracts in regard to personal property, if against the laws of the State where it is situated, or repugnant to the policy of such State, will not be held valid. (Story's Conflict of Laws, 244; *Zipcey v. Thompson*, 1 Gray [Mass.], 243; *Frazier v. Fredericks*, 4 Zabriskie, 166; *Smith v. Union Bk. of Georgetown*, 5 Pet. 518; 12 Wheat. 259; Burr on Assignments [2d ed.], 366; *Olyphant v. Atwood*, 4 Bosw. 461; *Hibernia Nat. Bk. v. Lacombe*, 84 N. Y. 367.) When the

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orders were delivered by the Mastin Bank to the public mails, that constituted delivery to the defendants. (*Barry v. Equitable Life Ins. Co.*, 59 N. Y. 594; 11 id. 441; 22 id. 527; 36 id. 307; 1 Par. on Cont. [6th ed.], 484; 2 id. 582; *Vassar v. Comp.*, 11 N. Y. 441; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dillon, 431; *Johnson v. Sharp*, 31 Ohio, 611; *Longstrass v. German Ins. Co.*, 48 Mo. 201; 6 Wend. 183; 1 B. & Ad. 681; 1 Mo. App. 585; 36 N. Y. 307.)

George H. Adams for respondent. The alleged assignment was never made, was never an enforceable contract in Missouri, but constituted a contract or transfer or assignment only in New York, and must be judged by the laws of New York. (*Cook v. Moffat*, 5 How. [U. S.] 295; 6 Peters, 635; Story on Conflict of Laws, § 287; *Lee v. Sellick*, 33 N. Y. 615; *Cook v. Lithfield*, 5 Seld. 280, 290; *Hyde v. Goodnow*, 3 Coms. 270; *Lawrence v. Bassett*, 5 Allen, 140; *Lunt v. B'k of N. A.*, 49 Barb. 221.) The assignment to the respondent operated as a valid and complete assignment of the debtor's property situated in New York. (*Ackerman v. Cross*, 54 N. Y. 29; *Boese v. King*, 78 id. 471.) The drafts are clearly bills of exchange. (Byles on Bills, 1, 128; Story on Bills, § 60; Chitty on Bills, § 182; *Wells v. Brigham*, 6 Oush. 6; *Michigan B'k v. Eldred*, 9 Wall. 544, 547; *Ellison v. Collingridge*, 9 C. B. 570; *Morris v. Lee*, 2 Ld. Raymond, 1396; 1 Daniel on Negotiable Instruments, § 35; *Risley v. Phoenix B'k*, 83 N. Y. 318.) The drafts did not constitute an equitable assignment. (*Christmas v. Russell*, 14 Wall. 84; *Risley v. Phoenix B'k*, 83 N. Y. 318; *Mandeville v. Welsh*, 5 Wheat. 277, 286; *Dickey v. Harmon*, 1 Cranch C. C. 201; *Strain v. Gourdin*, 11 Bank. Reg. 156; *Randolph v. Conley*, id. 296; *Winter v. Drury*, 5 N. Y. 525, 630; *Tyler v. Gould*, 48 id. 682; *Lunt v. B'k of N. A.*, 49 Barb. 221; *Rosenthal v. Mastin B'k*, 21 Alb. L. J. 28; *Att'y-Gen. v. Ins. Co.*, 71 N. Y. 325; *B'k of Commerce v. Bogy*, 44 Mo. 13; *Kimball v. Donald*, 20 id. 577; *Ford v. Angelbrodt*, 37 id. 50; *Burnett v. Crandall*, 63 id. 410; *Walker v. Mauro*,

18 id. 564; *Bryan v. Brisbane*, 16 id. 423; *McGrade v. Germ. S'vs Ins.*, 4 Mo. App. 330.)

DANFORTH, J. The question was whether the defendants were entitled to have the money in the hands of Donnell, Lawson & Co. applied in discharge of their claims, or whether it should be paid to the plaintiff. The learned referee held in favor of the plaintiff, and his decision has been approved by the General Term.

In this conclusion there was error. It seems to be well settled that a mere check or draft does not operate as an assignment or appropriation of the drawer's deposit in favor of the payee before acceptance by the bank (*Harris v. Clark*, 3 N. Y. 93; *Atty. Genl. v. Continental Life Ins. Co.*, 71 id. 325; 27 Am. Rep. 55), but the doctrine has not been extended beyond instruments of that character, drawn in the ordinary form; nor to a transaction not restricted to the very terms of such paper. The subject was recently before us in *Risley v. The Phoenix Bank of the City of New York* (83 N. Y. 318; 38 Am. Rep. 421), and it was held in substance that when in addition to the check there was an oral agreement between the drawer and payee, by which the former for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and recover the portion of the debt assigned, the agreement operated as an assignment, and was sufficient to vest in the payee a title to that portion of the debt. There was in that case presentation of the check and demand of payment before the adverse claim attached, and so, as the jury found, notice of the transfer; but that question is unimportant here, for the position of the plaintiff as a voluntary assignee for the benefit of creditors, is no better than that of his assignor (2 Story's Eq. Jur. [10th ed.], § 1228; Burrill on Assignments [2d ed.], 483), and it was not essential to a valid disposition of the claim that Donnell, Lawson & Co. should have been apprised of it. (*Muir v. Schenck*, 3 Hill, 228; *Beckwith v. Union Bank*, 9 N. Y. 211; *Bradley v. Root*, 5

Paige, 632.) The only object of notice is to put the debtor on his guard against dealing with the assignor on the belief that he still continued the owner of the debt. (*Graves v. Woodbury*, 4 Hill, 559; *Beckwith v. Union Bank*, *supra*, *Baker v. Kenworthy*, 41 N. Y. 215; *Martin v. Kunzmüller*, 37 id. 396.) The notice actually given was sufficient, however, even to bind Donnell, Lawson & Co. They received it before the claim of Coates was made known, much less assented to; for it should be observed that information given by him in August was merely that he had been appointed assignee of the bank, and that an assignment had been made. The specific fund was not demanded until September, long after advices had been received as to the claim of the Emporia Bank, and the letter and order from the Mastin Bank. During all that time they retained the money, made no offer to return the draft or order, claimed that the fund belonged to these defendants, and now by bringing it into court, subject it to equitable distribution. Under such circumstances notice *pendente lite* even is sufficient.

The question would be different if there were two *bona fide* purchasers for value, claiming the same fund, but as there are not we are to look at the transaction as between the Mastin Bank and its corresponding banks, the "Emporia Bank" and the "Salina Bank" (or Morris), and as they stand on the same ground it will be convenient to speak of one only — the Emporia Bank.

I am unable to see why, on the first day of August, there was not a complete and consummated contract between that bank and the Mastin Bank. The Mastin Bank, up to that day, owed the Emporia Bank, and was requested to pay its debt by transferring funds then with Donnell, Lawson & Co. They say by letter, "we will do so," at once charge the Emporia Bank, and credit themselves with \$5,000; on the same day, by letter, they inform the Emporia Bank that this has been done, and in fact they direct Donnell, Lawson & Co. to "pay to the order of credit, the Emporia Bank," the sum named. The Emporia Bank also credited the Mastin Bank with it. These circum-

stances in the conduct of both parties establish an agreement, the effect of which, as between the Mastin Bank and the Emporia Bank, was to estop the former from setting up that so much of the credit to which they were before entitled from Donnell, Lawson & Co. did not belong to the Emporia Bank, and the Emporia Bank from saying that so much of the debt before due from the Mastin Bank to it had not been extinguished. (*Allen v. Culver*, 3 Den. 284-292.) Written out, the contract indicated by the bank entries and the correspondence is one of assignment of so much of the credit, or funds then to its credit with Donnell, Lawson & Co., to the Emporia Bank, and a discharge of a debt due by it to that bank. The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the post-office. (*Graves v. American Ex. Bk.*, 17 N. Y. 205; *Brogden v. Metropolitan Ry. Co.*, L. R., 2 App. Cas. 666, 692; *Ex parte Harris*, L. R., 7 Ch. App. 596; *Barry v. Equitable Life Assurance Society*, 59 N. Y. 587, 594; *Wayne Co. Savings Bk. v. Low*, 81 id. 566; 37 Am. Rep. 533.)

Nothing further remained to be done. If the Mastin Bank could transfer the fund, it did transfer it by those acts. The paper which is called a draft needed no indorsement by the Emporia Bank, nor was it intended for its hands. It was not delivered to any one as a bill of exchange, nor did it require acceptance by the drawees. (*Morton v. Naylor*, 1 Hill, 584; *Lowery v. Steward*, 25 N. Y. 239.) It indicated to Donnell, Lawson & Co. an act to be done, but it was not a necessary act so far as title was concerned, and was effectual only as a voucher (*Lowery v. Steward*, *supra*), or notice of the rights of the Emporia Bank; it did not confer or establish any. As between these parties the credit or funds had ceased to be the property of the Mastin Bank. The Emporia Bank was no longer creditor, because it was paid. The credit, or right to call upon Donnell, Lawson & Co. for the same amount, was the means of payment.

In the ordinary case of a check or bill of exchange the banker determines whether the state of his customer's account will jus-

tify him in complying with the request to pay. But if he pays he does so from his own money. Here by the act of the customer, the title to the account itself had passed from him, and the check, or order, as it may more properly be called, was, between the customer and the assignee — the Emporia Bank, of no importance. The bankers, by virtue of the assignment, owed the money specified in the account, to the Emporia Bank, and it was not a matter as to which they had any discretion to exercise. True, before notice they might have paid to the customer, or to his order, but that feature is not in the case. The conduct of the parties here had the same effect as the transaction suggested by Lord MANSFIELD in *Heath v. Hall* (2 Rose, 271), viz.: "If two men agree for the sale of a debt, and one of them gives the other credit in his book for the price, that may be a very good assignment in equity," and is within the doctrine which upholds, as a sufficient assignment, an agreement that a debt owing shall be paid out of a specific fund belonging to the debtor, or an order given by him to his creditor upon a third person owing money or having funds belonging to the giver of the order, directing such person to pay the creditor out of such funds. (*Burn v. Carvalho*, 4 M. & C. 690.) That case is quite in point. The facts were that one Fortunato gave to Burn, his creditor, an order upon Rego, his agent, who then held goods or money of his (Fortunato's), directing him (Rego) to pay Burn his debt. Burn sent the order to Rego, but before it reached him Fortunato became bankrupt, and his assignees, Carvalho and others, insisted that because notice of the transaction had not reached Rego before the act of bankruptcy by Fortunato, the goods or funds remained subject to the order and disposition of Fortunato, as apparent owner at the time of the act of bankruptcy, and the assignees were entitled thereto. But it was held that Burn was the true owner and had a good title as against the assignees.

In the case before us, as in that, there was an existing fund in the agent's hands, and a distinct contract by the debtor with its creditor, to discharge the liability out of that fund, and to give directions for that purpose. That in this case directions

were sent to the agent by the debtor, and in the one cited, by the creditor, can make no difference. In neither case did it reach the agent before assignment.

I have not overlooked the contention of the respondent that the entries were mere matter of book-keeping for the convenience of the bank. It might be so if they stood alone. But taken in connection with the letters between the parties, and the order and letter of advice sent to Donnell, Lawson & Co., they are equivalent to an actual transfer of credit, or account; to an assignment, therefore, at least in equity, of the fund in the hands of Donnell, Lawson & Co. Somewhat similar circumstances were considered in *Prince v. Oriental Bank Corp.* (L. R., 3 App. Cas. 325), and were held insufficient to charge the bank making them, but it was on the ground that the banks whose acts came in controversy were in substance the same, each being a branch of one bank, yet the court assume that it would be otherwise if the parties were distinct, and the transactions had been communicated to the plaintiff—the party in interest, and in that case that the party making them would be estopped from saying it did not hold the money in question to his account. “But,” they say, “no such communication was made, and before any thing was known beyond the walls of the bank itself,” the order was canceled and withdrawn;—citing *Simson v. Ingham* (2 Barn. & Cres. 65) where it was held that the entries by bankers in their own books did not amount to a complete appropriation until that fact was communicated to the party to be affected by it.

In *Pratt v. Foote* (9 N. Y. 463) the plaintiff, a private banker, was held charged as on an agreement by entries made in the books of his bank, although not communicated to the defendant, and the latter was relieved from an obligation by reason of them. In the case before us the entries were preceded by the letter of the Emporia Bank, requesting a transfer of credit, accepted by the Mastin Bank, and the books made to conform thereto. Taken together they conclude the Mastin Bank and of course its voluntary assignee. They show an intention on its part to transfer to the Emporia Bank a specific

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amount of the fund on deposit with Donnell, Lawson & Co.; and this fact also distinguishes the case from *Attorney-General v. Continental Life Ins. Co.* (*supra*) on which the respondent so earnestly relies (see observations of CHURCH, Ch. J., p. 331), and as that intention was carried out by the communication between the parties and the instructions given to Donnell, Lawson & Co., the Mastin Bank did not thereafter "retain any control over the fund, any authority to collect, or any power of revocation." Therefore the claim of the defendants can be supported without departing from the principle upon which both the cases last referred to, and *Christmas v. Russell* (14 Wall. 84), also cited by the respondent, were decided.

It follows that the fund did not pass to the assignee. (*Hopkins v. Banks*, 7 Cow. 650; *Muir v. Schenck*, *supra*; *Osborn v. Thomas*, 46 Barb. 514.) The assignment to him is dated August 3; it purports to transfer the property "and credits" of the Mastin Bank; of course it speaks as of the day of its date, and on that day the credit in question was not its property. It could not withdraw or change its application and so revive its indebtedness to the Mastin Bank, or that of the defendants to itself. It does not appear, however, that the Mastin Bank undertook to again deal with this fund, or to assign it to its trustee, nor, if it had been possible to do so, that it undertook to deprive the defendants of the benefit of the contract under which they claim. It follows from these observations that the learned referee erred in finding that the money in question passed by assignment to the plaintiff, and that the defendants were not its owners. The facts upon which the question turns are not disputed, and we reach this conclusion without impairing the rule which in case of conflicting evidence makes the decision of the trial court binding upon an appellate tribunal. The learned counsel for the plaintiff urges that there is a variance between the defendants' answer and their proofs, but it is not suggested that such objection was taken upon the trial, and it cannot be successfully raised now for the first time. (*Fitch v. Rathbun*, 61 N. Y. 579.)

The judgment appealed from and that entered upon the

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report of the referee should be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

THE BANK OF OSWEGO, Appellant, v. WILLIAM H. DOYLE et al.,
Impleaded, etc., Respondents.

Warehousemen are liable for losses occasioned by innocent mistakes on their part in delivering goods to those not entitled to receive them.

Plaintiff and the firm of C. A. & Co., of which firm defendant C. A. was a member, entered into an agreement by which the former agreed to advance money to purchase a cargo of wheat at Toledo, Ohio, the same to be consigned to plaintiff at Oswego, and held by it as security for the advances. In pursuance of the agreement the wheat was purchased and shipped on board a schooner, of which defendants were joint owners. The bill of lading provided for the delivery of the wheat to plaintiff, and was indorsed over and delivered to it on payment by it for C. A. & Co. of a draft drawn upon and accepted by that firm. On arrival of the schooner at Oswego, C. A. reported it to plaintiff's cashier, who consented that the wheat might remain on board the vessel. Of this arrangement the defendants, other than C. A., had no knowledge. A portion of the cargo was sold and delivered on orders of plaintiff; the balance was removed and disposed of without its consent or knowledge by C. A. & Co. In an action to recover the value of the balance so taken, *held*, that defendants were liable; that conceding their liability as common carriers had ceased, as to which *quære*, before the wheat in question was removed, they were liable as warehousemen.

(Argued November 24, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

This action was brought to recover the value of a quantity of wheat alleged to have been delivered to defendants, as common carriers, for transportation, and which they refused to deliver to plaintiff, the consignee. The defendants were the owners of the schooner "Cheney Ames." At the same time

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defendant Doyle with Cheney Ames, Warren C. Pratt and Coman Ames were co-partners under the name of "Cheney Ames & Co." and as such were proprietors of a grain elevator and warehouse known as the "Reciprocity Elevator," in Oswego, and carried on business as millers, warehousemen and commission merchants in said city. In November, 1875, Cheney Ames & Co. procured the plaintiff to advance money for the purpose of paying for a cargo of wheat to be purchased at Toledo, less ten per cent of the purchase-price, which was to be paid by Ames & Co. as a margin. The wheat was to be consigned to plaintiff at Oswego and held by it as security for the sum advanced. In pursuance of the arrangement, about seven thousand six hundred and eighty bushels of wheat were purchased by parties in Toledo at the request of Ames & Co. and delivered on board the said schooner on the 20th of November, and plaintiff paid a draft drawn on Ames & Co., and accepted by them for the purchase-price, less the ten per cent, which was paid by that firm. The bill of lading provided that the wheat was to be delivered to the plaintiff, and the bill was duly indorsed and delivered to it. The schooner arrived at Oswego with her cargo on the 26th of November, and her arrival was immediately reported to the plaintiff's cashier, Lathrop, by Cheney Ames. Lathrop asked what he should do with the wheat, and was told by Ames that the schooner was not ready to unload; that on account of her draught of water she could not get up to the Reciprocity elevator and would require to be lightened. Lathrop replied that if she was not unloaded soon she must have a harbor insurance. The schooner was afterward lightened by taking from her about three thousand bushels of the wheat, which were sold and accounted for to plaintiff, and on the 30th day of November the schooner, with the remainder of the wheat on board, was towed to the wharf in front of the Reciprocity elevator and there moored. Ames & Co. procured an insurance of the wheat on board for one month, loss, if any, payable to whom it might concern, and delivered the certificate thereof to the plaintiff, who accepted and retained the same. The schooner was moored

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where she lay at the instance of Ames & Co., and for their accommodation, to enable them to sell the wheat from it, subject to the plaintiff's lien and upon its orders. The referee found that the plaintiff assented that the wheat might remain in the vessel for that purpose. He declined to find that the plaintiff requested that it should so remain, and he found that there was no contract to that effect, and no agreement to pay the owners of the schooner for the storage of the wheat on board of her or for demurrage. In January and February, while the schooner was lying at said wharf, Ames & Co. sold about two thousand five hundred bushels of the wheat. These sales were reported to the plaintiff; the price of each parcel was paid or secured, and thereupon the plaintiff gave to Ames & Co. an order on the schooner for the delivery of the parcel sold. Prior to the 23d of March, 1876, at what time it did not appear, Ames & Co. took from the schooner and converted to their own use the remainder of the cargo, without the knowledge or consent of the plaintiff. The master did not report to the plaintiff the arrival of the schooner and did not offer to deliver her cargo. The referee found that after the arrival of the vessel at Oswego the master surrendered the entire control to Cheney Ames, and thereafter acted under his direction. The defendant Doyle resided at Youngstown, Niagara county, and was ignorant of the storage of the wheat in the vessel after its arrival in Oswego.

Further facts appear in the opinion.

Albertus Perry for appellant. A party discounting a draft and receiving therewith a bill of lading of the goods, against which the draft was drawn, deliverable to his order, acquires a special property in them, and has complete right to hold them as security for the acceptance and payment of the draft. (*Donos v. Nat. Exch. B'k*, 1 Otto, 618, 630, 632; *First Nat. B'k of Toledo v. Shaw*, 61 N. Y. 283.) By sending an account of purchase to Cheney Ames & Co., no title to or interest in the wheat was transferred to them.

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(*Newcomb v. B. & C. R. R. Co.*, 115 Mass. 230.) As the bill of lading on its face showed that the title to the wheat was in the Second National Bank of Toledo, it would have passed no title to Cheney Ames & Co. (*Dows v. Perrin*, 16 N. Y. 325; *Dows v. Greene*, 24 id. 638, 640; *First Nat. B'k of Toledo v. Shaw*, 61 id. 283, 292.) By the contract of the master, contained in the bill of lading, he was bound to deliver the wheat to the plaintiff, unless prevented by the excepted perils, the "dangers of navigation, fire and collision." (Abbott on Shipping, 125 and note; *Hewitt v. Buck*, 17 Me. 153; 1 Parsons on Maritime Law, 380, 382 and note.) The plaintiff was the consignee of the cargo. (*Davidson v. City B'k*, 57 N. Y. 81, 85.) As defendants did not deliver the wheat or tender a delivery thereof to the plaintiff, their liability as carriers continued. (*Gould v. Chapin*, 20 N. Y. 259; 1 Pars. on Ship. and Adm. 222, 224; 1 Pars. on Mar. Law, 152-154; *Hathorn v. Ely*, 28 N. Y. 78; *Segma v. Reed*, 3 La. Ann. 695; *Zinn v. N. J. S'mb't Co.*, 49 N. Y. 442, 445; *Smith v. N. & L. R. R. Co.*, 7 Foster, 86; *Price v. Powell*, 3 Comst. 322.) If the carrier desires to terminate his liability after arriving at the port of destination with the goods, he must act himself. To await the action of the consignee will not avail. (*Zinn v. N. J. S'mb't Co.*, 49 N. Y. 442, 456.) Even if the plaintiff had been in fault by neglecting or refusing to receive the wheat, the defendants, in order to relieve themselves of their liability as carriers, would have been bound to store the wheat in a suitable warehouse for the use of the plaintiff. (*Hawthorn v. Ely*, 28 N. Y. 78, 81; *Zinn v. N. J. S'mb't Co.*, 49 id. 442, 445; *Redmond v. Liverpool, N. Y. & Phila. S. Co.*, 46 id. 578, 583.) It rested with defendants to show that they have delivered, or that they were ready to deliver, all of the wheat which they received at Toledo, and expressly contracted to deliver to the plaintiff. (Story on Bailin., § 520.) If defendants' liability as carriers had terminated before the missing wheat was taken, they remained liable as bailees or warehousemen. (*Hathorn v. Ely*, 28 N. Y. 78; *Platt v. Hibbard*, 7 Cow. 497, 500, and note; *Beardslee v.*

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Richardson, 11 Wend. 25; *Coleman v. Livingston*, 4 J. & S. 32; affirmed, 56 N. Y. 658; *Schwerin v. McKie*, 5 Robt. 404; affirmed, 51 N. Y. 180; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184; Story on Bailm., § 450; *Willard v. Bridge*, 4 Barb. 361; *Collins v. Burns*, 63 N. Y. 1, 7.) The defendants are responsible for the negligence or misconduct of Cheney Ames. (1 Pars. on Mar. Law, 94.)

W. H. Kenyon for respondents. The referee and the General Term having found that the plaintiff waived notification by the master of the "Cheney Ames" of the arrival of the vessel and his readiness to discharge the cargo, the decision of the General Term upon this question of fact is final and cannot be reviewed in this court. (Code of Civil Procedure, §§ 1337, 1338; *Vermilyea v. Palmer*, 52 N. Y. 471-475, 476.) The action on the part of the plaintiff in taking possession and control of the grain on shipboard released the defendants from all obligations as common carriers. (*Farmer v. B. & S. L. R. R. Co.*, 44 N. Y. 505-511; *Tabor v. Taber*, 35 Barb. 305; *Ide v. Sadler*, 18 id. 32-34, 35.) Where goods are held on the vessel at the port of delivery by arrangement with the consignee, the common carrier is thereby released from liability as such. (*Putnam v. Furman*, 71 N. Y. 590; *Hathorn v. Ely*, 28 id. 76.) The respondents are not liable for the wheat as warehousemen. (*King v. Lennox*, 19 Johns. 235, 236; *Tuckerman v. Brown*, 17 Barb. 192; *Williams v. Nichols*, 13 Wend. 58; 1 Pars. on Shipping, 91, 93, 97 and note 2.)

MILLER, J. The plaintiff in this action claims to recover the value of a portion of a cargo of wheat which the defendants, as common carriers, transported from Toledo to the city of Oswego, and which it is claimed they never delivered to the plaintiff, who was the consignee of the wheat. There is no doubt as to the fact that the plaintiff never received a portion of the wheat, and the principal question presented upon this appeal relates to the liability of the defendants for its non-delivery. It appeared upon the trial, and by the finding of the referee,

that Cheney Ames, one of the defendants, was one of the owners of the vessel upon which the wheat was transported, and also a member of the firm of Cheney Ames & Co., who were proprietors of the elevator and warehouse at which the schooner was moored; and that prior to the 23d of March, 1876, said Cheney Ames & Co. had taken and removed from the schooner the balance of the wheat remaining on board, and took and converted it to their own use, without the knowledge or consent of the plaintiff. On the last-named day plaintiff's cashier went on board of the schooner and demanded the wheat of the master, who then and there informed him that there was no wheat on board to answer the demand, and that, therefore, he was unable to deliver it.

The referee, after various findings of fact, found as a conclusion of law that the plaintiff waived a formal notice and readiness to deliver by the master, by consenting to treat with Cheney Ames instead of the master in relation to the delivery of the said wheat under a bill of lading. He also held that the vessel was ready or in a condition to be unloaded, after it was lightened and had reached the wharf where it was moored, as the plaintiff well knew by communication with the said Cheney Ames, and that by its consent to have the wheat remain longer on board, the plaintiff released the defendants, the Doyles, from their liability, under the bill of lading, as common carriers; that Ames, even if he had contracted to store the wheat in said vessel after its arrival, could not bind his co-owners by such contract without their consent or authority, and there being no proof of any agreement or consent by such co-owners that the wheat might remain on board the vessel after the arrival at the place of destination they are not liable to the plaintiff as warehousemen. The opinion of the General Term holds that there was a waiver by the plaintiff of notice of readiness to unload and deliver the wheat, and the plaintiff having had notice from Ames of the arrival of the vessel, and its action being such as to imply its assent that the cargo might remain on the vessel, the liability of the defendants as carriers was terminated and the wheat remained on board the schooner

for the accommodation of Cheney Ames & Co., with the knowledge and assent of the plaintiff, and there being no agreement on the part of the defendants, or either of them, to store the wheat, and none on the part of the plaintiff to pay for storage or demurrage, the Doyles, not being parties to the understanding between the plaintiff and Ames, in pursuance of which the wheat remained on the vessel, are not liable for the loss.

By the contract contained in the bill of lading the master was bound to deliver the wheat to the plaintiff unless prevented by the dangers that were excepted, namely, dangers of navigation, fire and collision. He failed to deliver the wheat as required, and unless some lawful cause is shown his principal should be held liable to the plaintiff for the damage sustained by reason of non-delivery. A carrier in possession of goods entrusted to his charge remains liable as insurer until a delivery in fact, or until he has performed some act which indicates his purpose to terminate his relation as carrier. (*Goold v. Chapin*, 20 N. Y. 259.) If he does not deliver, or offer to deliver, which the law esteems equivalent to delivery, his contract is not fulfilled. (*Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 445; 10 Am. Rep. 402; Pars. on Ship. and Adm. 222, 224.) He may also relieve himself from liability by notifying the consignee of his readiness to deliver.

The appellant's counsel claims that the conclusion of the referee, that formal notice was waived, was not warranted by the evidence. There is testimony showing that Cheney Ames informed the cashier of the plaintiff that the vessel had arrived, and that the cashier inquired of him what he should do with the wheat, and Ames replied that the vessel would have to lighten to get up the river and was not ready to unload yet, and that the cashier then said, if she did not unload immediately she would require a harbor insurance, that he wanted to take care of the wheat, to which Ames replied, that she would have to lighten at one of the elevators below to come up to one of their elevators, and that the cashier told him to bring the warehouse receipts to him. The cashier received

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the warehouse receipts for the grain, which was taken out in lighters, from Cheney Ames, and made no objection and gave no direction except requiring insurance. He also received a certificate of insurance running to December 30th following and he gave to Ames orders on the schooner for three parcels of grain sold, which were paid for to him. He also had knowledge of the arrival of the schooner. Cheney Ames testified that the cashier acquiesced in the wheat remaining on the vessel and it remained there at his request. There is no direct proof of an agreement to waive notice of a readiness to deliver, but it cannot perhaps be insisted that there was no evidence from which it might be inferred that there was such waiver, and that the referee was not justified in his finding in this respect.

But, even if there was a waiver of such notice, we do not think that that fact is to control the disposition of the case. The testimony of Cheney Ames shows that when the agreement was made for the advancement of the money to purchase the wheat it was understood that it could lay in the schooner and be paid for as it was taken out. This agreement was carried out in part by the payment for such portion of the wheat as was sold and disposed of at the time when delivery was made, and under the arrangement, as well as under the legal obligation which was assumed by the owners of the schooner that the wheat should not be disposed of without being paid for. This was an important element in the contract for the security of the advancement made by the plaintiff, and it is fair to assume, in view of the fact that the bill of lading was held by the plaintiff as a part of its security, that but for this the advancement would not have been made.

The referee has found, as a conclusion of fact, that the schooner, with the balance of the wheat, was moored at the instance and request of Cheney Ames & Co., for their accommodation, to enable them to sell and market the same subject to the lien of the plaintiff and its order, before it could be removed and delivered to the purchaser, and the plaintiff and Cheney Ames & Co. both understood and assented that the

wheat might remain in the vessel for that purpose, although there was no binding contract to allow it to remain for any length of time, or any agreement to pay the owners of the schooner compensation for the storage of the wheat until it could be discharged ; but we are unable to discover any direct evidence which establishes an arrangement of this character between the plaintiff and Cheney Ames. The only testimony bearing on the subject is to the effect that Cheney Ames made the arrangement, and it does not appear that he acted directly for the firm of Cheney Ames & Co., and that he did not act for the owners of the schooner. In the absence of such direct proof, there is no ground for claiming that there was proof to sustain the finding of the referee in this respect. The most that can be claimed is that plaintiff acquiesced in the vessel remaining where she was moored, and this fact does not establish that the wheat remained on the vessel under the charge or direction of Cheney Ames & Co., or that they had control of it. It may also be remarked that the conclusion of the referee, that the vessel was ready or in a condition to unload after it was lightened and had reached the wharf, and the plaintiff knew it, is not material ; and we think that the conclusion that the plaintiff released the defendants Doyles by its consent that the wheat should remain on board the schooner is not warranted and was erroneous.

Even if the wheat was ready or in a condition to be unloaded and the plaintiff knew it, it does not follow that the carrier was released from his duty and liability to moor the vessel at the wharf and to deliver or offer to deliver the cargo to the consignee. A tacit consent that the wheat should remain on board after the arrival of the vessel in port did not discharge the original undertaking, as it was proved on the trial that the wheat was to be paid for when delivered. Such being the contract, defendants have no right to dispose of the wheat although they had offered to deliver the same to the plaintiff, even if the plaintiff was in fault by neglecting or refusing to receive it. The carrier to relieve himself from liability was authorized to deposit the wheat in some suitable warehouse, if

any could be found, or by making some equivalent disposition of it for the owner, and his responsibility as carrier continued until this was done. (*Hathorn v. Ely*, 28 N. Y. 78, 81.) Even if the defendants did at any time relieve themselves from liability as carriers, it is not shown that the missing wheat was not taken from the vessel before that time. The referee finds that at what time or times it was taken from the vessel does not appear in evidence. Cheney Ames swears that he does not know whether there was any wheat taken out before January 11, 1876, and for any thing that is proved the wheat may have been taken and converted on the very day the vessel was first moored at the wharf, when the liability of the defendants as common carriers was in full effect and they were bound to deliver to the plaintiff all the wheat received at Toledo, or to account for the same. The wheat had disappeared, how and when the defendants had it in their power to show; and, having failed to deliver all the wheat they received, every presumption is in favor of the plaintiff's right to recover for the missing wheat. Even if it can be held that in any way the defendants' liability as carriers was terminated before the missing wheat was taken, as they still retained the wheat in their possession, they remained liable as bailees or warehousemen, and as such were bound to deliver the wheat to the plaintiff on demand, and having failed to do this must be regarded as having converted it to their own use, unless they prove it was lost without any fault on their part. (*Hathorn v. Ely*, 28 N. Y. 78; *Platt v. Hibbard*, 7 Cow. 497; *Beardslee v. Richardson*, 11 Wend. 25.) The plaintiff had assumed to control the disposition of the wheat from the beginning, had never authorized the defendants to deliver it, except upon its specific order, and several lots were delivered in that way. This was the contract as we have seen, and the defendants were not discharged from it, even assuming that they were relieved from liability as common carriers. This was not the extent of their duty; and as the plaintiff was entitled to the wheat it is not apparent why the defendants were not liable for the grain in their possession as owners of the schooner. It was their duty to keep the control of it, and they were liable for

negligence in allowing it to be taken and converted. If they consented that the property should remain on the vessel and were relieved thereby from their liability as carriers, the schooner became a warehouse, and they, being the owners, were liable either in one capacity or the other. The burden of proof was upon the defendants to establish that they were without fault after demand and refusal, and they were bound to show that they exercised ordinary care in keeping and preserving the wheat until called for. (*Schwerin v. McKie*, 5 Robt. 404; affirmed, 51 N. Y. 180; 10 Am. Rep. 581; *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61.) Warehousemen are not only liable for losses occasioned by their negligence, but for those which arise from innocent mistakes in the delivery of goods to persons not entitled to receive them. Although it does not appear that there was any agreement on behalf of the owners of the vessel for the storage of the grain, the responsibility of the defendants as warehousemen arises from their failure to deliver the wheat to the plaintiff as they had contracted to do, and retaining it on board the vessel. This created a lawful obligation as warehousemen, and it was not necessary that the Doyles should consent that the wheat so remain in order to make them liable. The liability, therefore, does not rest upon the master of the vessel alone, nor are the defendants relieved by the finding of the referee that the vessel was left at Oswego in charge of Cheney Ames. The contract and consideration paid for the carriage and storage of the wheat was a single one; the contract for storing resulting from and being an incident to the main contract for the carriage of the same. (*Cary v. C. & T. R. R. Co.*, 29 Barb. 35, 45; 45 N. Y. 189.) The conclusion of the referee that the defendants Doyles were relieved from liability, we, therefore, think was erroneous. The claim of the respondents' counsel, that the plaintiff released the defendants from all duties and liability as common carriers by arranging with Cheney Ames & Co. that the wheat should remain on the vessel, cannot be upheld, and the discussion already had sufficiently disposes of this branch of the case. None of the authorities cited in this connection sustain the

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position that under circumstances like these the owners of the vessel would be relieved from liability.

The other questions presented by the respondents' counsel have been considered and examined, and we are unable to find any ground upon which the judgment can be upheld, it should, therefore, be reversed and a new trial granted, costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

. JOSIAH D. PAYNE, as Trustee, etc., Respondent. v. ELIZABETH H. FREER et al., Appellants.

By an agreement between co-partners engaged in the business of banking, each of whom contributed to the capital of the firm, it was stipulated that each partner should be allowed six and one-half per cent per annum on the average amount of his deposits, and if either should overdraw his account, he should pay interest on the average of such overdrafts at the rate of ten per cent per annum during the continuance of the partnership. F., one of the partners, overdrew his account, and gave to plaintiff, as trustee for the firm, his bond and mortgage for the balance against him, as shown by the partnership books, interest being charged against him as stipulated. The co-partnership was dissolved by the death of F. In an action to foreclose the mortgage, wherein the defense was usury, the trial court found that the agreement was not a device to evade the usury law. *Held*, that the overdrafts were not usurious loans, that the agreement was in effect simply that the partner withdrawing funds should make a contribution to profits equal to the estimated earning power of the capital withdrawn, and so was valid.

When the partnership was formed there were certain notes outstanding endorsed by F. and which, as between him and the makers, were for him to pay; these were taken up by the firm, and were renewed from time to time, the interest being charged to the account of F. at the stipulated rate, and the advances to take up the notes were finally also charged. *Held*, that these advances were overdrafts within the meaning of the partnership agreement and were not usurious.

(Argued November 22, 1882; decided January 16, 1883.)

APPEAL from an order of the General Term of the Supreme Court, in the third judicial department, entered upon an order

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made September 6, 1881, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 25 Hun, 124).

This action was brought by plaintiff, as "trustee for Schuyler County Bank," to foreclose a mortgage executed by George G. Freer and wife. The material facts are stated in the opinion.

George B. Bradley for appellants. The finding that the Hill notes were indorsed by Freer and discounted at ten per cent per annum by the bank, were so discounted under a usurious agreement, was justified by the evidence and they infected the mortgage with usury and rendered it void. (*Haughtwout v. Garrison*, 69 N. Y. 339; *Fiedler v. Darrin*, 50 id. 437; *Thurston v. Cornell*, 38 id. 281; *Cope v. Wheeler*, 41 id. 309; *Price v. Lyons Bk.*, 33 id. 55; *Winsted Bk. v. Webb*, 39 id. 325; *Swartwood v. Puyne*, 19 Johns. 294; *Williams v. Storm*, 2 Duer, 52; *Jones v. Hake*, 2 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 id. 66; *Pratt v. Elkins*, 80 N. Y. 198-202; *Wyeth v. Braniff*, 84 id. 627; *Jackson v. Packard*, 6 Wend. 415; *Fulton Bk. v. Benedict*, 1 Hall, 480; *Williams v. Fitzburgh*, 37 N. Y. 446; *Rice v. Welling*, 5 Wend. 397; *Hammond v. Hopping*, 13 id. 511; *Newell v. Doty*, 33 N. Y. 83; *Gerwig v. Sitterly*, 56 id. 214; *Patterson v. Birdsall*, 64 id. 294.) The finding by the court on the question of the purpose and intent of the bank in taking the rate of ten per cent per annum in discounting the Hill notes is conclusive. (*Bergin v. Wemple*, 30 N. Y. 319, 324; *Baldwin v. Van Dusen*, 37 id. 487, 490; *Borst v. Spelman*, 4 id. 284; *Reformed P. D. Church, etc., v. Brown*, 24 How. 76, 86; *State of Michigan v. Phoenix Bk.*, 33 N. Y. 10; *Crocker v. Crocker*, 31 id. 507; *Thompson v. Bank of B. N. A.*, 82 id. 1, 7; *Fabbri v. Kalbfleisch*, 52 id. 28; *Taylor v. Guest*, 58 id. 262, 265-6; *Meyor v. Lathrop*, 73 id. 321; *Cox v. James*, 45 id. 558, 559, 560; *Caswell v. Davis*, 53 id. 223, 229.) The insertion of the word "exchange," in the checks charged to Freer for the forbearance, did not aid the plaintiff. (*Price v. Lyons Bk.*, 33 N. Y. 55; *S. C.*, 30 Barb. 85; *Cope v. Wheeler*, 41 N. Y. 303, 309.) The agree-

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ment to take ten per cent, its computation, and securing it by the mortgage, being done by the firm understandingly, establishes the intent to violate the statute. (*Friedler v. Darrin*, 50 N. Y. 437; *Tyng v. Com. Warehouse*, 58 id. 308.) The statute of usury does not permit a firm, pursuant to agreement, to loan to one of the members its money at any rate of interest in excess of that authorized by law, and a contract for that purpose is invalid. (*Melville v. Am. Benefit B. Assn.*, 33 Barb. 103; *Herbert, etc., v. Kenton Building & S. Assn.*, 11 Bush [Ky.], 296; *Mills v. Salisbury B. & L. Assn.*, 75 N. C. 292; *Columbia B. L. Assn. v. Bollinger*, 12 Richardson's Eq. 124; *Building L. Assn. v. Dorsey*, 15 S. C.; Tyler on Usury, 288-9; *Cotton v. Dunham*, 2 Paige, 267; *Morse v. Wilson*, 4 Term R. 353; *Cole v. Reynolds*, 18 N. Y. 77.) A firm may deal with one of its members as well as with a stranger, and for that purpose its existence with its own rights and interests distinct from those of the respective members is recognized. (*Cole v. Reynolds*, 18 N. Y. 77; *Walker v. Wait*, 50 Vt. 668; *Seighartner v. Weissenborn*, 20 N. J. Eq. 172; *Townsend v. Goewey*, 19 Wend. 424, 430; Pars. on Part. 240, 241; Story's Eq. Jur., § 680; *Kingsland v. Braisted*, 2 Lans. 20.) A firm cannot lawfully charge its member greater than the legal rate for money loaned by it to such member, where the amount and such rate are payable at all events, and not dependent upon the trade or profits. (*Melville v. A. B. B. Assn.*, 33 Barb. 103; *Herbert v. K. B. & S. Assn.*, 11 Bush, 296; *Evans v. Negley*, 13 S. & R. 218, 222-3; Tyler on Usury, 289; *Quackenbush v. Leonard*, 9 Paige, 334, 346; *Morse v. Wilson*, 4 Term R. 353, 356; *Braynard v. Hop-pock*, 7 Bosw. 157; affirmed, 32 N. Y. 571; Tyler on Usury, 284-297; *Munn v. Commission Co.*, 15 Johns. 44, 56; *Jones v. Hope*, 2 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 id. 66; *Williams v. Storm*, 2 Duer, 52; *Clark v. Sisson*, 22 N. Y. 312; 4 Duer, 408; *Tiedmann v. Ackerman*, 16 Hun, 307.)

J. McGuire for respondent. All moneys received by the Schuyler County Bank, whether by deposit or otherwise, be-

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came the property and effects of the firm. (*Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; *Carroll v. Cone*, 40 Barb. 220; *Marsh v. Oneida Central Bk.*, 34 id. 298; *Commercial Bk. v. Hughes*, 17 Wend. 95.) An agreement between partners, or members of an association, that one of the co-partners or members may draw and use a part of the co-partnership funds and pay for the use of such sum an amount in excess of lawful interest is not of itself an usurious agreement, but one that is valid and may be enforced. (*Silver v. Barnes*, 6 Bing. N. C. 180; *Delano v. Weld*, 6 Allen, 9; *Farredy v. Herndon*, 1 Jacob, 144; *Tyler on Usury*, 185; *Burbridge v. Cotton*, 8 Eng. L. & Eq. 57; *Gow on Partnership* [2d ed.], 28; *Endlerly v. Gilpon*, 5 B. & Ad. 954; *Morris v. King*, 2 Burr. 891; *Johnson v. P. B. Assn.*, 2 Quarterly L. J. 347; *Red Bk. Bldg. & L. Assn. v. Patterson*, 27 N. J. Eq. 223; *Massey v. Citizens' Bldg. Assn.*, 22 Kans. 624.) The firm would be liable for all debts contracted to depositors. The overdrafts mentioned in the contract would necessarily be made from money placed there by depositors, which the firm would be under obligation to pay when demanded, or from the capital of the bank; hence the capital of the firm by the overdrafts might be placed in hazard, and for that reason the transaction would not be usurious. (*Tyler on Usury*, 185, 186; *Quackenbush v. Leonard*, 9 Paige, 346.) A balance for which suit may be brought need not be a final or general balance of all the partnership accounts after a dissolution, but it is sufficient if it embraces a settlement of particular matters or a balance of specific things which the partners agree to arrange, and so far as the specific matters embraced are concerned, it is conclusive between the parties. (*Coffin v. Brian*, 11 Eng. Com. Law, 35; *Brierly v. Gripps*, 32 id. 833; *Carr v. Smith*, 5 Q. B. 128; *Clark v. Dibble*, 16 Wend. 601; *Gridley v. Dale*, 4 Const. 486; *Collyer on Part.*, § 269; *Englis v. Furniss*, 2 Abb. Pr. 333; *Bouton v. Bouton*, 40 How. Pr. 217.)

FINCH, J. Three persons formed a co-partnership for the purpose of transacting a banking business, under the name and

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style, as a firm, of the Schuyler County Bank. The terms of their agreement were fixed by written articles, providing that the mode of conducting their business should, as far as possible, be like that adopted by regular banks; and, among other usual and ordinary provisions, containing one out of which has grown the present litigation. It was stipulated that "to each or either of said co-partners there shall be allowed a rate of six and one-half per cent on the average amount of his deposits, to be computed on the first Monday of January in each and every year, and on overdrafts either and each who may overdraw his accounts shall pay interest on the average of such overdrafts at the rate of ten per cent per annum, to be computed and paid on the said first day of January in each year, but in this connection it is understood that neither of said co-partners shall overdraw his account in said bank without the consent of the other partners." The capital stock of the firm, which was thus organized in 1873, and was to continue for ten years, was fixed originally at \$30,000, to be contributed in equal proportions by each of the co-partners, either in cash, "or in good genuine notes bearing seven per cent interest." George G. Freer deposited his note for the \$10,000 of capital to be contributed by him; and Payne and Pellet, the other two partners, either did the same thing, or paid in their capital in cash; the evidence leaving room for a possible doubt, and the adverse parties here disagreeing on the subject. The capital was afterward increased, and other partners admitted, who contributed smaller amounts and in unequal proportions, which seem to have been paid in cash. For a time Freer's account with the firm showed a balance to his credit, but in June of the first year the balance shifted, and his debtor account in the main steadily increased. This result occurred in two ways; by his checks drawn upon the firm which were paid when no funds stood to his credit on his individual account, and by the payment, or, as it is claimed on one side, by the discount of notes upon which Freer was liable either as maker or indorser, when the balance of account was against him. This indebtedness increased, notwithstand-

ing the annual credit of dividends, until in November of 1876 the balance against him, as shown by the books of the partnership, was over \$50,000, and on the tenth of that month he gave to Payne, one of the partners, as trustee for the firm, his bond and mortgage for \$52,383. The business continued thereafter until April, 1878, when the co-partnership was dissolved by the death of Freer. Thereafter Payne, as trustee, began a foreclosure of the mortgage by suit in equity, alleging simply a default and no special needs of the partnership, and seeking no final accounting. The principal defense was usury, and it is that which presents the important question as to which the courts below have differed; the Special Term sustaining the defense as to the notes, and the General Term rejecting it wholly.

As between a banking firm and a depositor not a member of the firm, an overdraft is a loan. The payment of the latter's check when no funds stand to his credit is an advance by the firm of its own money, for the repayment of which, with the lawful interest, the customer is liable. It is payable absolutely and in full, without abatement or contingency, and so constitutes a loan in all its characteristics. If more than the legal rate of interest is agreed upon and paid, the borrower loses the excess above such legal rate, and if the contract stands and is carried out the loss is absolute and certain. But the situation changes when the person making the overdraft is a member of the firm which advances it. If he is charged merely the legal rate of interest while the net profits of the business are larger, to the extent of his overdraft he has withdrawn his own capital while sharing, as if he had not, in the profits earned by the remainder. If his overdraft equals his capital, his entire contribution as partner to the profits earned would be six per cent, while that of his co-partners might be ten or twenty per cent, and equality of division would be a wrong and injustice to them. By such process he could lend his capital withdrawn by overdraft, and with the six per cent thus earned pay the interest on the overdraft, and then, out of the partnership profits, get, not only lawful interest upon his share of the capital, but a proportionate part

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of the excess earned by the capital of his associates, and so receive profits to the earning of which he had contributed nothing; reap where he had not sowed. Instead of such an arrangement the associates would be likely to dispense with the costly and useless co-partner, and, borrowing at six per cent an amount equal to his capital, pay but lawful interest for its use, and keep the excess of earnings for themselves instead of bestowing it as a gratuity. When, therefore, a banking firm is organized, equality and justice require that this possible evil should in some manner be prevented. It may be accomplished by provisions which forbid overdrafts. But is that, necessarily, the sole remedy? If every overdraft is charged with a rate of interest which equals the rate of profit, or as nearly so as can be estimated in advance, the inequality and injustice is redressed. But if such an arrangement is a loan, in any just and proper sense, and the rate allowed is interest for the use of money, the transaction is usurious; and right here comes the collision of the respective litigants. Is such an arrangement, therefore, a loan of which usury can be predicated? If the partner who makes the overdraft is a borrower he is, at least, that kind of a borrower who to some extent borrows of himself. He has an interest in the fund which he receives and whatever he pays goes in part to himself. This fact interweaves his debt, so far as it is one, with the business results and risks. To call his overdraft a loan, and hold it tainted with usury is, in practical effect, to say that one may take usury of himself. As a borrower he is a victim of usury, while as a lender he is one of the usurers. One who has paid usurious interest may sue to recover it back, but if he has paid it to himself jointly with others, his co-partners, he must sue himself jointly with them if he sues the firm. Such an action would be at least a novelty. The taking of usury corruptly and in violation of the statute is a criminal offense. If this overdraft was a usurious loan the offense was committed by the firm. It was done in pursuance of an agreement in which all joined. If there was crime in it all were criminals alike, and yet one of the three must be held guiltless, although equally guilty with the rest, or else be

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convicted of taking usury of himself. The difficulties thicken as we examine the transaction more closely and trace out its ultimate results. It is said that the advance to Freer was a loan because both principal and interest were payable absolutely and without contingency by the borrower. But, disregarding for the present the subsequent promise contained in the mortgage, and confining our attention to the nature of the overdrafts, let us inquire when and how the advance was payable. The provision for interest implies credit given for some length of time, although no time was expressly named. But the agreement provides, first, that each co-partner shall be allowed interest on the *average* amount of his deposit, "to be computed on the first Monday of January in each and every year." That necessarily means each and every year during the continuance of the partnership and until its close, and dictates the mode of keeping the individual accounts. And in like manner the stipulation that ten per cent should be charged on the permitted overdrafts, to be computed and paid "on the *said* first of January in each year," means each year during the continuance of the partnership, and necessarily implies that the principal of the overdraft is payable only at the close of the partnership or upon an earlier adjustment of its affairs. Before such accounting is the advance even a debt? It was said in *Bouton v. Bouton* (40 How. Pr. 218, citing Story on Part., § 348) that "if any partner has made advances to the firm and others have received advances from it, these do not constitute debts, strictly speaking, till the concern is wound up." What is meant is, and such must be the result inevitably, that the advances are only payable upon an adjustment of the partnership accounts, and until then constitute no debt, and may never; for that adjustment may show nothing due from the alleged borrower. (*Richardson v. Bank of Eng.*, 4 Myl. & C. 165; *Crawshaw v. Collins*, 15 Ves. 218.) The principal, therefore, is payable, not absolutely, but upon a contingency which is the business risk. Possibly this may seem clearer and more certain if we test it by some simpler state of facts than those before us. Suppose each partner has paid in \$10,000, and then the one who overdraws does so

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to the exact extent of his capital paid in, let us see what the ultimate results may be. If the firm reaches the end of the partnership term, or a point of settlement, voluntary or compelled, with the overdraft outstanding, and with net annual profits of ten per cent, what is it which happens to the alleged borrower? If he is to be debited with his overdraft, he is to be credited with his capital to be returned, and so far as the principal of his overdraft is concerned he owes nothing and has none of it to pay. He has simply withdrawn his capital in advance; not borrowed it, but taken in advance and earlier than he ought what was all the time and ultimately his own, subject to the business needs and risks. Then as to interest. He stands charged with ten per cent, but is credited with ten per cent on the same amount as profits. As matter of form he has paid ten per cent for the use of the firm's money. As matter of fact he has simply had the use of his own money, and neither gained nor lost a dollar by force of the transaction; so that in the supposed case, neither the principal nor interest were in fact paid or even payable. The loan and the usury had no existence except formally in the accounts and as matter of book-keeping. What would have been a loan and must have been usury is divested wholly of the characteristics of each by the relations existing between the parties.

But the precise case we have used as an illustration can rarely happen. The rate of profits to be earned in the future cannot be accurately known and may prove to be more or less than the estimated rate; and the overdrafts of a partner may be less or largely more than his contributed capital. These uncertain elements change the true character of the transaction only in the respect that they weave into it the hazards and contingencies of the business, and so furnish one of the reasons for rejecting the defense of usury. While for the purpose of adjusting the accounts an agreed rate is charged, it does not follow that such rate will be in fact paid. If the profits earned exceed the estimate, the advantage is on the side of the partner who has overdrawn, for having contributed to profits the smaller sum he shares in the larger earnings; while on the

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other hand, if the profits of the business are less, he has lost by an estimate which was too large. Until a final settlement of the accounts it will be impossible to tell how much he has in fact paid for the use of his capital withdrawn, or how much of the principal he will be compelled to restore, since both are interwoven with the contingencies and hazards of the business and are dependent upon its results. What the borrowing partner does is not to pay ten per cent for the loan of money, but rather to make a contribution to profits equal to the estimated earning power of the capital withdrawn, and belonging in part to himself as one of the firm. Or, to state it in another form, he agrees that from his share of dividends shall be deducted, or to the partnership assets shall be added, ten per cent upon his overdrafts in arriving at a settlement of the partnership affairs. Until then he owes nothing. It is impossible to call such a transaction an usurious loan, if the view we have taken be correct, and will bear the test, when confronted by one further criticism of the learned counsel for the appellant. Briefly stated, it is this: a firm may contract with an individual member; that contract may be enforced in equity, although in the process such member sues himself; when the firm seeks to enforce it the capacity to make and the validity of the contract is asserted; and the individual member may meet the attack, with any defense which would be open to a stranger. We are unwilling, for the present, to admit the foundation upon which this argument rests, notwithstanding the authorities cited in its support. (*Cole v. Reynolds*, 18 N. Y. 77; *Walker v. Wait*, 50 Vt. 668; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Townsend v. Goewey*, 19 Wend. 424; Pars. on Partn. 240, 241; Story's Eq. Jur., § 680; *Kingsland v. Braisted*, 2 Lans. 20.) It is not easy to see how, even in equity, the firm, as such, could effectively have sued Freer for the advances. (*Richardson v. Bank of Eng.*, *supra*.) But we need not answer that question, nor determine any thing on the subject; for, conceding the appellant's claim in this direction, it shows only that Freer could avail himself of any defense open to a stranger, but does not show that what

would be usury between the firm and a stranger is also usury between the firm and one of its members, and does not establish that what would be a loan if made to a third person may not be something very different if made to a partner. So that the ultimate question remains the same.

We may now consider the authorities to which we have been referred, and see how far our judgment of the inherent nature of the transaction is sustained. The earliest of the cases cited is that of *Silver v. Barnes* (6 Bing. N. C. 180). The defendant was a member of a mutual benefit society, whose funds were raised by joint contributions under its rules and regulations, and were loaned at five per cent interest, but to the person who bid the highest premium for the loan. Defendant borrowed £80, paying therefor a bonus of more than £15. The court said: "The question was whether the transaction was a loan of money, or a dealing with the partnership fund. If it was a loan it was usurious. We think it was a dealing with the partnership fund in which the defendant had an interest, in common with the other members of the society, and that it was not a loan. The defendant was interested in the money when it was advanced, and when it was repaid." It is to be observed that in this case the form of the transaction was that of a loan. The society assumed to lend, and the subscriber to borrow. A period of credit was fixed and the running rate of interest prescribed. And yet, looking beyond the form of the transaction, and considering its substance, the court ruled it was not a loan, founding its conclusion upon the fact resulting from the partnership, that the alleged borrower was interested both ways; as well in the money paid, as in that received. The criticism of the learned counsel for the appellant, upon this case and others like it, does not parry its force. He argues that there was no agreement to pay more than the lawful rate of interest which was fixed at five per cent. But there was an agreement to pay and an actual payment of a premium or bonus, in excess of the lawful interest, as a condition of the loan. It is our common experience that usury is generally secured by that method. And the court assumed

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what could not be denied: that the arrangement, if in fact a loan, was void for usury. This case was followed by others, differing in their circumstances and characteristics, not always exactly pertinent, but recognizing and confirming the fundamental doctrine of the principal case. (*Fereday v. Hordern*, 1 Jacob, 144; *Gilpin v. Enderbey*, 5 Barn. & Ald. 954; *Morisset v. King*, 2 Burr. 891; *Burbidge v. Cotton*, 8 Eng. L. and Eq. 57; *Delano v. Wild*, 6 Allen, 9; *Bowker v. Mill River Loan Fund Association*, 7 id. 100; *Merrill v. McIntire*, 13 Gray, 157; *Red Bank Mut. B. and L. Ass'n v. Patterson*, 27 N. J. Eq. 223; *Massey v. Citizens' B. Ass'n*, 22 Kans. 624.) It is claimed, however, that the current of authority is broken by decisions holding a contrary doctrine, one of which is in our own State. (*Melville v. American Ben. Build. Ass'n*, 33 Barb. 103; *Herbert v. K. Build. and Sav. Ass'n*, 11 Bush, 296; *Mills v. Salisbury Build. and L. Ass'n*, 75 N. C. 292; *Columbia Build. and L. Ass'n v. Bollinger*, 12 Rich. Eq. 124; *Build. and L. Ass'n v. Dorsey*, 15 So. Car. 462.) The first of these cases recognizes the doctrine we have approved, but denies its application to the case before the court. It holds distinctly that the transaction was not usurious if it was a dealing with partnership funds, but only in case it was a loan; and then proceeds to analyze the complicated and confused rules of the society, and evolves the conclusion that they were framed to evade the law against usury, and that the advances made were loans in disguise. Whether that conclusion was right or wrong, the case recognized the doctrine we have been considering. The same observation applies to the cases in Kentucky and North Carolina. In each the societies defending were corporations, but charged to be mere covers or devices for lending money at unlawful rates, and not within the purpose or intent of the statute which permitted such organizations. The case of the *Columbia Build. and Loan Ass'n v. Bollinger*, decided in South Carolina, went further. It questioned the doctrine of *Silver v. Barnes*; intimated that it failed to explain the principle on which it was founded; and asserted an inability to discern how treating the

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transaction as a partnership dealing "could have sanctified" the taking of excessive interest. The case of *Dorsey* in the same State was decided later, and merely followed the precedent established. All of these cases had to deal with the varying and often complicated facts and conditions growing out of the manner in which the associations involved were organized and operated. None of them arose in the simpler form of an ordinary partnership, providing in good faith and with reasonable business prudence, for the case of overdrafts by individual members. There was here no device or subterfuge to evade the usury laws in the making of the original agreement. The trial court found that explicitly, and held that the reservation of ten per cent upon the overdrafts contemplated by that agreement was not usurious. Upon principle and authority we are satisfied with that conclusion.

But the trial court also held that other and subsequent transactions were not within the scope of that agreement, and infected with usury the mortgage given in part for their security.

In considering this branch of the case we may confine our attention to the Hill notes, for if these were not outside of the general partnership arrangement, it is safe to conclude that none of the other transactions were.

When that partnership was formed there was outstanding in the hands of the First National Bank of Watkins a note of \$5,000, made by Hill, and indorsed by Freer, which, as between maker and indorser, was understood to be payable by the latter, and was being carried on his credit and for his convenience. This note was renewed from time to time, and one of the renewals fell due after the note had been transferred to the Bank of Penn Yan, and after the partnership was formed. On the second day of July it was paid by the Schuyler County Bank out of the co-partnership funds; presumably, and without doubt at the request of Freer and for his benefit. Stopping at that point, this payment was clearly an overdraft, even within the definition of the Special Term. It was money of the partnership, withdrawn at his individual request, and applied to his

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individual use. It does not matter that the request was oral and not in the form of a check. The inherent character of the overdraft is not affected by that circumstance. Nor is it of consequence that the money was delivered to Freer's creditor, or was used to pay Freer's debt. It was none the less an advance to him, and the use to which he appropriated it concerned only himself. It was an advance made, so far as the evidence discloses, without any new or special agreement. It was, therefore, under the partnership contract, controlled by its terms and chargeable in the partnership accounts with the ten per cent reserved, and an overdraft within the meaning of the original agreement. It was thus not usurious, and when absorbed in the mortgage, precisely upon the same terms with other overdrafts, could not taint that instrument with usury. What followed we do not deem material, since it respected only the form of carrying the overdraft and getting it upon the books, and not at all the substance of the transaction. At first it was not charged to Freer in his individual account, probably from an expectation that it would soon be repaid, and for a time it was noted upon a slip and treated as a cash item. But in a brief period a new note of \$5,000, signed by Hill as maker and Freer as indorser, was substituted for the slip. This note was given for six months and must have been dated July 2, 1873. On the 10th of November, 1873, the bank charged to the account of Freer the interest at ten per cent to January 7, 1874. Whenever renewed, the same process was repeated until the 10th of November, 1876, Pellet occasionally drawing a check for the interest, to which he signed Freer's name, and the one note being divided into two of equal amount, and the whole principal due being charged to Freer at the last-mentioned date in his individual account. These renewals were plainly not intended as loans or discounts. The advance was made at the beginning, and the notes were taken, not as payment, but as so many promises to pay, the interest charged in the individual account, and the advance itself charged when there seemed no longer hope of the notes themselves being paid. As to some of these renewals the trial court finds that they involved a vio-

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lation of the law and were founded upon a corrupt agreement, but such finding cannot be true if the transaction was not a loan, and is based upon a conclusion that it was. We think differently. It seems to us clear that the advance was made out of the funds of the partnership, as a partnership transaction, and under the partnership agreement, and what occurred afterward was an endeavor, as that agreement prescribed, to assimilate the form of the advance and the mode of carrying it to the methods of regular banks without at all changing the substantial nature and character of the transaction. We think, therefore, the General Term correctly held that the mortgage was not usurious.

The order of the General Term should be affirmed and judgment absolute ordered for the plaintiff upon the stipulation, with costs.

All concur, except RAPALLO, J., absent.

Order affirmed, and judgment accordingly.

In the Matter of the ATTORNEY-GENERAL v. THE NORTH
AMERICAN LIFE INSURANCE COMPANY.

Where, in an action brought by the attorney-general against an insolvent life insurance company, after the entry of judgment dissolving the corporation and appointing a receiver of its assets, certain of the policy-holders were allowed to intervene, who appeared by attorneys and contested the allowance of commissions, claimed by the receiver, which were materially reduced, *held*, that the court had no power to make an allowance to the intervenors out of the funds in the hands of the receiver for their disbursements and counsel fees, as they were simply individual parties protecting their own interests.

The cases where such allowances have been made to trustees, or to one or more of several persons interested in a common fund who have brought suit to protect or recover the fund, distinguished.

(Argued November 28, 1882; decided January 16, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 23,

to the suit. It might have run its course and ended in a final distribution without the presence of any of them, and each was admitted as a party because he had his own individual and personal interest in the assets to be distributed, and solely that he might represent and protect that personal interest in the further proceedings. Others of the policy-holders did not intervene, and were contented to allow their interests to be represented and protected by the attorney-general and the receiver appointed by the court. The moving papers do not show that the intervenors, through their counsel, did any thing whatever to affect the action of the court until the receiver presented his account and asked for a settlement and discharge. Up to that point of time we must assume that they stood only in the attitude of interested observers. But upon the presentation of the account they claim to have become active and useful. They filed exceptions which were, in the main, aimed to reduce the receiver's compensation. They claim that the attorney-general filed none and made default. Possibly that was so because the intervenors had voluntarily raised all necessary questions, and put them before the court, and his repetition of them was not requisite to the result. However that may be, the objections were heard and resulted in an order which reduced the commissions of the receiver very seriously, and compelled him to a rehearing before the superintendent of insurance as to the rate to be allowed. Quite an amount was thus saved to the policy-holders in the sense that it was not required to be paid to the receiver. Nothing was added to the fund in the hands of the court. An improper payment out of it was prevented. This result benefited the respective intervenors. It made the share of each in the ultimate disposition of the fund larger than it might otherwise have been, and in this respect the other policy-holders were proportionally benefited. One of the intervening attorneys subsequently presented a petition to the Special Term in behalf of one hundred and forty policy-holders whom he claims to have represented, asking to be paid out of the funds in the hands of the receiver disbursements or expenses to the amount of \$169, and a counsel fee of \$500. The Special Term

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denied the motion for want of power to grant it; the General Term affirmed that denial, and the question is brought here on appeal.

It comes before us purely as a question of power. If, upon the facts presented, the court had legal authority to grant the allowance, we must reverse the orders appealed from. It should also be observed that the application is not for costs as between party and party. These are regulated by the Code; their amount fixed, except as to extra allowances; and the latter prescribed and kept within fixed limits. As to these, courts of equity have a discretion to allow them or not, and to determine who shall pay and to whom, but there their discretion ends, except as to the extra allowance permitted in certain cases. In respect to these taxable costs between party and party the power of the court was long since exhausted as regards the present litigation, and no such question remains. The allowance which the petitioners seek is of a different character and entirely outside of the Code, and what is often described as costs between solicitor and client.

The most familiar illustrations of that sort of allowance are found in cases where suits are brought and defended by trustees, or persons acting *en autre droit*. The principle upon which counsel fees are granted in such instances is that of a necessary disbursement, and it stands upon the same ground as any other necessary expense of the preservation of the fund. Often and usually the trustee has no interest, outside of the performance of duty. What he does is for the benefit of others whose interests are for the time being in his keeping. He owes them no duty to expend his own money for their benefit, and whatever he does so expend in the reasonable and prudent care of the trust fund is properly allowed to him as an expense. Counsel fees thus incurred to an extent approved by the court may, therefore, be allowed him, and if fixed in advance of his actual payment, they are none the less the necessary expenses of his trust. (*Downing v. Marshall*, 37 N. Y. 387; *Irving v. DeKay*, 9 Paige, 533; *Wetmore, Ex'r, v. Parker*, 52 N. Y. 450.) The allowance claimed in the present case is sought to

be defended on this principle, but the facts do not justify the contention. The intervening parties are termed *quasi* trustees, charged with a duty to protect the general interest, but nothing could be further from the truth. As parties to the action they represented nobody but themselves, and owed no duty to anybody else. If their interests came in collision with those of other policy-holders they fought for their own, as they had a right to do. They came in as individuals to guard their own personal rights. No one in any manner authorized them to speak for or act for any person but themselves, and they cannot become volunteer trustees for those who never asked or requested their interference. They had no fund in their hands for the preservation of which they were responsible. Their sole effort and aim was to get as much of it for themselves as possible, and if, in that effort, others were benefited, they cannot claim to be trustees for such others so as to get still more of the fund for themselves. The receiver was the trustee to whom the allowance was due and was made, and the intervenors were simply individual parties protecting their own personal interests.

Much the largest proportion of the cases cited on behalf of the appellants fall within the principle of allowances to trustees. Many of them respect counsel fees awarded to executors, administrators and guardians; to assignees and committees of lunatics; and lately we have further applied the principle to the case of a corporation defending itself and the funds intrusted to its care against an attack upon its corporate life made at the suit of the attorney-general. (*Barnes v. Newcomb*, 89 N. Y. 108.) Its defense was the defense of a trustee, seeking in good faith to regain possession of its trust funds, and preserve its corporate life for the performance of its trust duties.

But we are referred to another class of cases which have lately come under consideration in the Federal courts. (*Trustees of the Internal Improvement Fund of Florida v. Greenough*, Alb. Law Journ., vol. 25, p. 492.) These are cases in which one of several persons interested in a common fund

brings an action in his own name, but for the benefit also of such others as may choose to come in and avail themselves of the litigation, for the purpose of reclaiming the fund and subjecting it to the control of the court. The case cited was one in which trustees had improperly diverted and transferred the trust estate and failed to appropriate it to the purposes of the trust, and the plaintiff filed a bill not only in his own behalf but also in behalf of all others interested, and succeeded in reclaiming the trust estate and placing it within the control of the court through the agency of a receiver. The illustrations cited as authority and as analogous were proceedings for restoring property to the uses of a charity which had been unjustly diverted: (*Att'y-General v. Brewers Co.*, 1 P. Wms. 376; *Att'y-General v. Kerr*, 4 Beav. 297) creditor's suits where a fund has been realized by the diligence of the plaintiff: (*Stanton v. Hatfield*, 1 Keen, 358; *Thompson v. Cooper*, 2 Coll. 87; *Sutton v. Doggett*, 3 Beav. 9), and petitions in bankruptcy where assets are recovered for the common benefit of creditors who come in and prove their claims. (*Worrall v. Harford*, 8 Ves. 4.) We need not consider how far these adjudications of the Federal, and of the English courts would be followed by us in similar cases. Assuming them to rest upon a distinct equity and upon sound principles, it is enough that the case before us does not fall within their range and scope. In many respects they seem to be nearly related to the cases in which expenses are allowed to trustees, and possibly might prove to be an outgrowth of the same general principle. The suitor proceeds not only in fact but in form in behalf of and as trustee for others who may come in. If they do so, they recognize his agency, and voluntarily avail themselves of his offer. But the petitioners here stand in no such attitude. They have brought no suit; they have recovered no fund; they have defended in their own behalf, not even offering or proposing to defend for others; and nobody has become a party on the faith of their action. Those upon whom they seek to levy tribute were already represented in the action by the receiver and the attorney-general. To the expenses of the

former they were bound to contribute, and came under no obligation to attorneys whom they did not employ, and to whose services they never assented.

But a broader proposition is finally advanced, and the existence of a third class of cases is asserted. It is said that "in an action or special proceeding for the administration of a fund *in the hands of the court*, where a judicial apportionment or determination of rights is necessary for this purpose, the costs, *counsel fees*, and expenses of all necessary parties are a *lien and charge upon the fund*; not as legal costs taxable under the Code, or allowances in the discretion of the court under the Code, but as necessary expenses or just allowances prior to and as a necessary expense of distribution." Stripped of its verbiage, this doctrine is that because the court has control of a fund brought to it for distribution it may give it away as it pleases. If it means that, the power of the court would indeed reach the case of these petitioners, but it would make the judge in equity an arbitrary tyrant, and none the less so because the tyranny disguised itself in a judicial command. If it does not mean that, if it is intended only to say that the control of the fund and the duty of distribution empowers the court to recognize the rights and act upon the equities of the parties before it, then nothing new is asserted, and the question still remains, what right or equity have these petitioners upon which the court can base an authority to deliver to them a share of that which belongs to others? We have carefully considered the authorities cited under this point of the appellants. Most of them relate only to costs as such between party and party and whether to be imposed personally or upon the fund. These have no bearing upon the subject under discussion. From the opinions in others, or the language of text-books, expressions are culled to the effect that a fund in court must bear the expense of its administration; that costs in chancery depend upon conscience and the whole merits of a case; that counsel fees out of a common fund belonging to the parties to the action may be allowed, and that the power of the court over funds in its hands to award costs to be paid out of the fund has

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often been recognized. (2 Barb. Ch. Pr. [2d ed.] 338; *Eastburn v. Kirk*, 2 Johns. Ch. 317, 318; *Hotaling v. Marsh*, 14 Abb. Pr. 164; *Campbell v. Mesier*, 4 Johns. Ch. 333; *Barnes v. At. Mut. L. Ins. Co.*, 59 How. Pr. 240; Willard's Eq. Jur. 49.) What is meant by these authorities is no more than this, that the control of the fund furnishes the opportunity and imposes the duty of recognizing every substantial equity and every existing right in making the distribution, and they leave still before us the inquiry, what right or equity in the petitioners could arm the court with power to transfer to them a portion of the fund beyond their normal share? If there is not such equity there is no such power, for the court does not sit as a bandit, dividing booty.

Have, then, the petitioners any such equity? Let us examine their position more narrowly. They were not necessary parties; they were permitted to intervene in behalf of their own personal rights; they brought no fund into court; the corporation was slain by an earlier blow and an arm stronger than theirs; they came to partake of the distribution; they assailed the amount of the receiver's commissions; they pointed out where they were in excess; they helped the court with ability and zeal in a just determination of that amount. We do not undervalue their service, or rebuke their effort. They have earned just compensation and deserve to receive it; but what we decide is that the clients who employed them should pay and not those who did not. The precise doctrine which we are asked to declare is that wherever the court has been aided in its conclusion by a party appearing, that party may have allowances out of the right of one not appearing. It assumes that the court would have gone wrong but for the good advice it got; that neither it nor the attorney-general would have raised the question; that he would not have done it at their request, they not appearing; that but for their protest the court would have over-paid its own officer; and that the parties who acted are entitled to extra pay for making the court perform its plain and obvious duty. This doctrine, once laid down, would easily draw within its range almost every case in equity

and work out dangerous results. We reject it. A claim for such allowances as are here sought must rest upon some recognized equitable right or there is no power to grant it. It is quite possible that there are no instances of its just exercise which do not fairly come within the principle of trustees' expenses; but we do not decide that; we cannot foresee what case may come, and choose to leave open the door for such equity and justice as may press upon us for recognition. But it must be equity and justice. We discover neither in this application, and repeat what we recently said in another case, that "we are not aware of any rule or principle whereby any of these parties are entitled to call upon others to pay counsel fees which they incur on their own behalf for the protection of their personal interests." (*Savage v. Sherman*, 87 N. Y. 285.)

Both parties refer to our recent decision in *Attorney-Gen. v. Continental L. Ins. Co.* (88 N. Y. 571). What was there decided harmonizes entirely with our present conclusions. We denied the right of the State, through an allowance to its chief law officer, or to special counsel by him employed, to share in the assets of a dissolved company. We could discover no ground of principle, no substantial equity upon which such an allowance could be defended. What was further said as to the power of the attorney-general to employ special counsel related to a retainer very broad and comprehensive. We intimated in that case, on a review of the statutes, that neither the attorney-general nor the governor, except in the cases pointed out by the statute, was authorized to employ counsel to appear for the people, so as to make their compensation a charge against the treasury; but we did not determine that the attorney-general could not depute special counsel to appear in his behalf, they making no claim against the State for compensation; nor that their right to so appear was open to question more freely than if they claimed to represent a private individual.

The order appealed from should be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.

Statement of case.

ELLEN URQUHART, Respondent, v. THE CITY OF OGDENSBURG,
Appellant.

Where power is conferred upon a municipal corporation to make local improvements, its exercise is *quasi* judicial or discretionary, and for a failure to act or an erroneous estimate of the public needs, a civil action cannot be maintained against it.

Where, therefore, an accident was alleged to have been occasioned by an alleged defect in the plan upon which a sidewalk was constructed, *i. e.*, that the slope was too great, *held*, that the municipal corporation was not liable; also, that the fact that the corporation did not, prior to the construction of the sidewalk, expressly adopt the plan upon which it was constructed did not impose such liability; that the approval of the plan when completed was as much a judicial act as the design of it.

Clemence v. City of Auburn (66 N. Y. 384), distinguished.

(Argued December 6, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 20, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

Edward C. James for appellant. A municipality is not liable in a private action for an omission to exercise discretionary functions for the benefit of the public at large. (2 Dillon on Mun. Corp., § 753, note 1; Wharton on Negligence, § 260; *Hines v. City of Lockport*, 50 N. Y. 236; *Mills v. City of Brooklyn*, 32 id. 489; *Lynch v. Mayor*, 76 id. 60; *Wilson v. Mayor*, 1 Denio, 595; *Cole v. Medina*, 27 Barb. 218; *Peck v. Batavia*, 32 id. 634.) It is indispensable to establish, as matter of fact, that the municipality took some action in respect to the sidewalk at the locality in question before it can be charged with negligence in respect to it. (*Saulsbury v. Village of Ithaca*, 24 Hun, 12.) It is indispensable to prove the absence of negligence on the part of the person injured, in order to justify a recovery for an injury caused by

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negligence. (*Reynolds v. N. Y., etc., R. Co.*, 58 N. Y. 250; *Cordell v. N. Y., etc., R. Co.*, 75 id. 332; *Hart v. H. R. B. Co.*, 84 id. 56, 62; *Johnson v. H. R. R. Co.*, 5 Duer, 21, 26; 5 Lans. 43, 48; 6 id. 381, 385-6; 2 Bosw. 589-602; 19 How. Pr. 370, 371-2; 23 Hun, 75.) Had the common council directed this walk to be built on this identical slope, the city could not be held liable for the plaintiff's injury. (*Hines v. Lockport*, 50 N. Y. 236, 238; *Mills v. Brooklyn*, 32 id. 489; *Child v. Boston*, 4 Allen, 41; *Merrifield v. Worcester*, 110 Mass. 216; *Darling v. Bangor*, 68 Me. 112; *Detroit v. Buckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 id. 152; *Marquette v. Cleary*, id. 296.) But the omission to exercise discretionary functions is no more actionable than the exercise of them. (*Saulsbury v. Ithaca*, 24 Hun, 12.)

Leslie W. Russell for respondent. Under the charter it was the duty of the common council to construct and keep in repair sidewalks and streets, so as to prevent injury to the public who are obliged to pass over them. (*Diveny v. The City of Elmira*, 51 N. Y. 506, 513; *Clemence v. The City of Auburn*, 66 id. 334; *Hines v. The City of Lockport*, 50 id. 237, 239; *Ellis v. Village of Lowville*, 7 Lans. 434; *Wilson v. City of Watertown*, 3 Hun, 508.) All persons have the right to rely on the assumption that the streets and sidewalks are in good condition and secure, even the aged, blind and infirm. (*Davenport v. Ruckman*, 37 N. Y. 568; *Clemence v. City of Auburn*, 4 Hun, 386; affirmed 66 N. Y. 334, 341; *Woolsey v. G. T. R. R. Co.*, 83 id. 121.) A sufficient length of time had elapsed between the alteration of the sidewalk in 1875 and the time of the injury in 1879 to give the common council ample notice of the existence of the defect, and sufficient time also elapsed from the times of the various falls to have given notice of its dangerous condition, especially considering the public character of the place. (*Todd v. The City of Troy*, 61 N. Y. 506; *Requa v. City of Rochester*, 45 id. 129.) The defense of judicial discretion was not pleaded, and is an affirmative defense. (*Clemence v. City of Auburn*, 66 N. Y. 339.) Grant-

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ing, for the sake of argument, that there is a *quasi* judicial discretion in establishing the grade, yet when that grade has been fixed, unless the common council also exercise the further judicial discretion to alter that grade, it is the duty of the common council to see that such grade is adhered to, so far as the question of negligence arises. (*Woolsey v. G. T. R. R. Co.*, 83 N. Y. 121; *Hutson v. Mayor*, 9 id. 163; *Mills v. City of Brooklyn*, 32 id. 489; *Rochester W. L. Co. v. City of Rochester*, 3 Comst. 464; *Conrad v. Trustees of Ithaca*, 16 N. Y. 159; *Hudson v. Mayor, etc.*, 5 Seld. 163.) A sidewalk is a part of a street or highway. (*Wilson v. City of Watertown*, 3 Hun, 508; *Ellis v. Village of Lowville*, 7 Lans. 434.) By the admission that the place of the injury was one of the public streets of the city of Ogdensburg, the inference arises that the city had assumed entire jurisdiction over the walk in question. (*Marvin v. U. L. Ins. Co.*, 85 N. Y. 278-283; *Mallory v. Travelers' Ins. Co.*, 47 id. 54; *Binsse v. Wood*, 37 id. 526-532; *Shotwell v. Mali*, 38 Barb. 445; affirmed, 36 N. Y. 200; *Belknap v. Seeley*, 14 id. 147; *Salisbury v. Howe*, 87 id. 128.) There was no question of contributory negligence which became a law question for the court. (*Davenport v. Ruckman*, 37 N. Y. 568; *Evans v. City of Utica*, 69 id. 166; *Driscoll v. Mayor of New York*, 11 Hun, 101; *Darling v. Mayor*, 18 id. 340.) Knowledge of a defect is not sufficient to establish contributory negligence. (*De Wire v. Bailey*, 25 Alb. L. J. 116; *Woolsey v. G. T. R. R. Co.*, 83 N. Y. 121.) It is not necessary to allege in the complaint that plaintiff is free from negligence. (*Haskell v. Village of Penn Yan*, 5 Lans. 48; *Wolfe v. Sup'rs of Richmond*, 19 How. 370; *Johnson v. H. R. R. Co.*, 5 Duer, 21; *S. C.*, 20 N. Y. 65; *Richards v. Westcott*, 2 Bosw. 602; *Hackford v. N. Y. C. R. R. Co.*, 13 Abb. [N. S.] 13, 24; *Mac Donell v. Buffum*, 31 How. 154, 162; *Railroad Company v. Gladmen*, 15 Wall. 406; *Melhado v. Pough. Co.*, 15 W'kly Dig. 193.) An averment that the negligence of the defendant was the cause of the injury is equivalent to an averment that it was the sole cause, and that plaintiff was free from negligence. (*Develin v. Smith*, 15 W'kly Dig. 316;

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Button v. H. R. R. Co., 18 N. Y. 248 ; *Johnson v. R. R. Co.*, 20 id. 65.)

MILLER, J. This action was brought to recover damages for injuries sustained by reason of a fall upon a sidewalk in the city of Ogdensburg.

The complaint alleged that the defendant with full knowledge and notice did negligently and carelessly allow, suffer and permit one of the streets and sidewalks of the said corporation and city to remain and be in an unsafe and dangerous condition, and did suffer and permit the said sidewalk and highway to be constructed in a dangerous and unskillful and careless manner, and that the plaintiff, while passing along said sidewalk and street, sustained the injuries for which the damages are claimed. The principal defect complained of is the slope of the sidewalk from the building to the street, which was proved to have been about seven and three-eighth inches in a width of six and one-third feet. Ice had been formed upon the sidewalk by water being carelessly spilled just previous to the accident, in consequence of which the injury was caused.

At the close of the testimony upon the trial, the counsel for the defendant moved for a nonsuit, upon the ground that negligence cannot be predicated upon the plan or slope on which the walk was built, for that was in the discretion of the common council. The motion was denied and the defendant excepted. The same question was presented by a request to the court, to charge that the defendant cannot be held liable for any fault in the plan of the work, and hence was not liable for the steepness of the slope or incline from the platform to the curbstone. This also was denied and an exception taken to the ruling. The court, however, did charge "that if the corporation had adopted a plan in terms; that is, if the common council, the body having charge of sidewalks, had taken into consideration in advance the subject of what would have been a proper walk to construct at this place, and had determined that, the city would not have been liable undoubtedly for constructing a walk of this kind. But the common council did

not take into consideration in advance this subject; it took no action upon it."

The court erred in denying the motion for a nonsuit and also in refusing to charge as requested.

The rule is well settled that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the street or improvement made the duty of keeping it in repair is ministerial, and for neglect to perform such a duty an action by the party injured will lie. (*Hines v. City of Lockport*, 50 N. Y. 238; *Mills v. City of Brooklyn*, 32 id. 489; *Lansing v. Toolan*, 37 Mich. 152; *Marquette v. Cleary*, 37 id. 296; *Darling v. Bangor*, 68 Me. 112.)

COOLEY, Ch. J., in reversing the judgment in the *Toolan Case* says: "In planning public works a municipal corporation must determine for itself, to what extent it will guard against possible accidents. Courts and juries are not to say it shall be punished in damages for not giving to the public more complete protection; for that would be to take the administration of municipal affairs out of the hands to which it has been intrusted by law. What the public have a right to require of them is that in the construction of their works, after the plans are fixed upon, and in their management afterward, due care shall be observed; but negligence is not to be predicated of the plan itself."

This rule was held to be applicable as well to work done as to a design proposed. The approval of the plan when completed is as much a judicial act as the design of it. It is of no consequence that the judgment was exercised at different times so long as it comprehended the single plan. (See *Lansing v. Toolan*, 37 Mich. 152.)

These remarks are directly in point, and any other rule than the one laid down in the cases cited would enlarge the

liability of the municipal authorities to an extent not sanctioned by any adjudicated case. The sidewalk in question was proved to have been strongly constructed and in good repair, and the allegation is that the plan upon which it was built was defective and dangerous; that it was too steep, and not that it was out of repair. It is very plain, the city could not be held liable for a defect or error in the plan, and it is, therefore, manifest that the court erred in refusing to nonsuit and also in refusing to charge as requested, unless that portion of the charge already stated obviated the difficulty.

Such, we think, was not the case, and this rule was expressly, as we have seen, repudiated in *Lansing v. Toolan* (*supra*). The effect of such a rule would be that if the common council had the right in its discretion to build this walk upon the plan, and exactly as it was built, it would have no right in its discretion to omit to disapprove of it after it had notice of the manner in which it was built, and that for this reason it would be liable. If the common council were authorized to direct the walk to be built upon the plan which was adopted and did not do it, it is unreasonable to say that they would be liable for a defect which would not have existed if they had ordered it.

The evidence shows there had been a sidewalk at the place in question since 1855, and there was no proof by whom or under what authority it was originally built. About the year 1874, or 1875, a new plank walk was built over the old one. It does not appear by what authority this new walk was built, and the only proof given by the plaintiff on that subject was that nothing could be found on the city records respecting it. There was some evidence on the part of the plaintiff, tending to show that the new walk was steeper than the old one, but it is not very clear what the difference was, or that the change was of a radical character; the old plan was followed substantially in the building of the new walk.

We think, that as the original plan required the exercise of judicial discretion in establishing the grade, it must be assumed that such discretion was also exercised in carrying out the plan in laying down and constructing the new walk, and as the action of the plaintiff cannot be maintained upon the ground that

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the original plan was defective, it is not apparent in what way it can be upheld by reason of the alleged change in the grade. In this connection it may be remarked that the cases relied upon by the counsel for the respondent relate only to the prosecution of the work which the law holds to be ministerial in its character, and that it should be performed in a safe and skillful manner.

This action is not brought for unskillfulness in making and repairing the walk, but for a radical defect in the plan and in the reparation thereof according to the same.

In the case of *Clemence v. The City of Auburn* (66 N. Y. 334) the common council had directed the building of the sidewalk, and one of its members in constructing it made an alteration from the original plan which was entirely unauthorized. The slanting stone which caused the accident in that case, instead of being laid as directed by the common council, was laid contrary to its directions by an alderman. The result was the injury complained of. There is a wide distinction between that case and the one at bar.

Conceding that when the grade has been fixed the common council are bound to see that the grade is adhered to and cannot establish a different one, as it is not clear that any such change or variation was made in deviation from the original plan as would establish negligence on the part of the defendant, no liability was incurred.

If the city can be held liable for the injury sustained it must be upon the assumption that it was responsible for the plan of the work and its continuance, and having this in view it is difficult to see how the city can be held responsible upon the ground stated in the judge's charge.

As a new trial must be granted upon the ground already considered it is not necessary to discuss the other questions raised. For this reason also the questions arising upon the demurrer do not demand examination.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

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**THE CORN EXCHANGE BANK, Respondent, v. THE NASSAU BANK,
Appellant.**

91	74
118	473
119	200

91	74
126	337

91	74
134	44

- A check, dated November 9, 1874, drawn upon plaintiff, a New York city bank, the indorsement of the payees whereon had been forged, was paid by it to defendant, who had received it from a depositor in the regular course of business, and charged it to the drawer's account. In March, 1876, the drawers notified plaintiff of the forgery and commenced suit against it to recover the moneys withheld by it on account of the check. Notice of the suit was given to defendant, judgment was recovered therein against plaintiff, and after payment thereof this action was brought. It appeared that neither plaintiff nor the drawer of the check took any measures to ascertain the genuineness of the indorsement until about the time of the commencement of the action; that if this had been done the forgery would have been discovered, and defendant, if it had been notified thereof, could have protected itself from loss by calling upon its depositor. *Held*, that defendant was liable for the amount of the check with simple interest from the time of payment; that no duty to defendant rested on plaintiff to examine and ascertain as to the genuineness of the indorsement before paying; and that it was not estopped by the delay; but that defendant was not liable for the costs in the suit against plaintiff; that having failed in its duty to its depositors it could not charge the expense of an action caused by such default upon a third person.

Elwood v. Deifendorf (5 Barb. 398), *Thompson v. Taylor* (72 N. Y. 82), *Delaware Bank v. Jarvis* (20 id. 226), distinguished.

Also *held*, that evidence was properly excluded of a usage among banks in the city of New York, making it plaintiff's duty to examine and satisfy itself as to the genuineness of the indorsement and to return the same immediately if not good.

A local usage cannot be set up to contradict or alter a rule of law.

(Argued December 6, 1883; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

It appears from the complaint that on the 9th of November, 1874, Messrs. Kunhardt & Co. were depositors with the plaintiff, and on that day made their check upon it, payable to the order of William Ives and John Waters,

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for the sum of \$19,000. On the next day it was presented, and then, purporting to be indorsed by the payees, was paid to the defendant and charged to the drawer's account. On the 23d of March, 1876, Kunhardt & Co. notified the plaintiff that the indorsement was forged, and commenced suit for the recovery of the moneys withheld from them on account of said check and obtained judgment therefor, with costs. Notice of this suit was at its commencement given to the defendant, and after payment of the judgment the plaintiff demanded repayment of the amount so paid, and offered to return the check to it; being refused, it brought this action. Issue was taken by answer on the question of forgery, and it also set up that the check was received by the defendant from one B., its depositor, in the regular course of business, for collection, and after collection credited to him and so became subject to his check; that his account continued and was good for an amount exceeding the check during the greater portion of the time from its date up to and including March, 1876; that it was retained by the plaintiff until December 3, 1874, when it returned it to Kunhardt & Co.; that no steps were in the mean time taken by it to ascertain the genuineness of the indorsement, nor by Kunhardt & Co., until March 23, 1876; that the defendant's depositor (B.) became insolvent, and by reason of the omission of the plaintiff and Kunhardt & Co. to discover the forgery and notify the defendant, its position had been altered to its injury. Upon the trial it was conceded that the signature of the payees of the check was forged, and it was proven that neither the plaintiff nor Kunhardt & Co. took any measures to ascertain its genuineness until the time above mentioned. There was also evidence from which it was apparent that if it had been otherwise the forgery would have been discovered and the defendant, if notified thereof, might have protected itself from loss by calling upon its depositor "B." Various exceptions were taken during the trial, and at its close the defendant asked to go to the jury; first, upon the question "whether the defendant has not shown that it was injured to the full extent of the \$19,000 and interest, or to some part

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thereof, by the plaintiff's negligence or *laches* in failing to give notice of the alleged mistake;" second, whether it has not proved a loss suffered by it in consequence of the mistake committed by the plaintiff, to the full extent of the check and interest; third, whether in consequence of the recognition by the plaintiff of the check in question, the defendant did not pay out to its depositor (B.) the moneys held on deposit for him on that and subsequent days, or some part thereof. This was denied. Thereupon the court directed a verdict for the plaintiff, for \$27,553.43, made up, first, of the amount of the judgment recovered against the plaintiff by Kunhardt & Co.; second, of plaintiff's expenses in defending that action; third, interest on the judgment. To the allowance of each item the defendant excepted. After verdict, in pursuance of this direction, the defendant moved upon the minutes for a new trial. It was denied. An appeal was taken from the judgment and the order denying a new trial, to the General Term, where both were affirmed, and from its decision the defendant appeals to this court.

Joseph H. Choate for appellant. Where a payment has been made under a mistake of a material fact, no recovery can be had, if the position of the party receiving payment, has been changed, in consequence to his disadvantage. (*Mayer v. The Mayor, etc.*, 63 N. Y. 455; *Nat. B'k of Commerce v. Nat. Mechs. B'k Assn.*, 55 id. 211; *Allen v. Fourth Nat. B'k*, 59 id. 12; *Rathbone v. Stocking*, 2 Barb. 145; *Macaulay v. Corning*, 3 La. Ann. 409; *Gloucester B'k v. Salem B'k*, 17 Mass. 32; 2 Parsons on Notes and Bills, 597-9.) By means of the plaintiff's *laches*, and the consequent damage and change of position, to its detriment, inflicted upon the defendant, the plaintiff is clearly estopped from reclaiming the money. (*Voorhis v. Olmstead*, 66 N. Y. 113; *Cont'l Nat. B'k v. Nat. B'k Commw.*, 50 id. 575.) The judge erred in excluding the evidence offered to show the usage as to the duty of paying teller of the Corn Exchange Bank. (Lawson on Usages and Customs, 205, 206, 209, §§ 65, 67, 68, 72; id., 211, § 74; id., 485,

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§ 248; *Ellis v. Ohio L. Ins. & T. Co.*, 4 Ohio St. 628.) Where a bank pays money on a check on which the indorsement of the payee is forged, the loss must fall on the bank and not on its depositor. (*Coggill v. Am. Exch. B'k*, 1 N. Y. 113; *Weisser v. Denison*, 10 id. 68; *Morgan v. B'k of State of N. Y.*, 11 id. 404; *Graves v. Am. Exch. B'k*, 16 id. 205; *Walsh v. German Am. B'k*, 73 id. 424; Morse on Banks and Banking [2d ed.], 350; Mayne's Law of Damages, 46; *Roach v. Thompson*, 4 C. & P. 194; *Whitney v. Nat. B'k of Potsdam*, 45 N. Y. 301.)

John M. Bowers for respondent. The indorsing of its clearing-house number on the check and its presentation through the clearing-house by the defendant to the plaintiff, from whom the defendant, by such means, received the face of the check, was an indorsement of the same and rendered the defendant liable as indorser. (*White v. Continental Nat. Bk.*, 64 N. Y. 316; *Susquehanna Valley Bk. v. Loomis*, 85 id. 207, 211.) No formal indorsement was necessary. (*Jones v. Ryde*, 5 Taunt. 488, 493; *Herrick v. Whitney*, 15 Johns. 240; Chitty on Bills [ed. of 1849], 245; *Brown v. B. & D. Bk.*, 6 Hill, 343; *Merchs.' Bk. v. Spicer*, 6 Wend. 443; *Rex v. Begg*, 3 P. Wms. 419; Story on Bills and Notes, § 121; *Herring v. Woodhull*, 29 Ill. 98; *Gibson v. Powell*, 6 How. [Miss.] 60.) An indorsement of commercial paper is a contract and warranty with every subsequent holder that the instrument itself and all the signatures, antecedent to the said indorsement thereon, are genuine, and the party who indorses a forged check and gives it currency must bear the loss. (*Turnbull v. Bowyer*, 40 N. Y. 460; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Bk. of Commerce v. Un. Bk.*, 3 N. Y. 230, 236.) The check having been paid by the plaintiff to the defendant through a mistake of fact as to such check having been indorsed by the payees, and without knowledge that the signatures of the payees were forged, the plaintiff is entitled to recover back the amounts paid out and interest. (*Bk. of Commerce v. Union Bk.*, 3 N. Y. 230; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Kingston Bk. v.*

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Ettinge, 40 N. Y. 391; *Marine Bk. v. Nat. City Bk.*, 59 id. 67; *Holt v. Ross*, 59 Barb. 554.) The notice given the defendant was sufficient. (*Bk. of Commerce v. Union Bk.*, 3 N. Y. 230-237; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Weisser v. Denison*, 10 N. Y. 68-78; *Kingston Bk. v. Ettinge*, 40 id. 391; *Lawrence v. Am. Nat. Bk.*, 54 id. 432; *White v. Cont. Nat. Bk.*, 64 id. 319; *Nat. Bk. of Commerce v. Nat. Mechs.' Bk'g Ass'n*, 55 id. 211; *Mayer v. Mayor, etc.*, 63 id. 455; *Weisser v. Denison*, 10 id. 68; *Welch v. Ger. Am. Bk.*, 73 id. 424; *Frank v. Chemical Nat. Bk.*, 84 id. 209; *Talbot v. Bk. of Rochester*, 1 Hill, 297.) Neither the drawer nor plaintiff were affected by the acts of Barrett. (*Welch v. German Am. Bk.*, 73 N. Y. 424-430; *Robinson v. Chemical Nat. Bk.*, 86 id. 404; *Weisser v. Denison*, 10 id. 68; *Holtzinger v. Nat. Corn Exc. Bk.*, 6 Abb. [N. S.] 292.) The defendant having been notified of the pendency of the action instituted by Kunhardt & Co. against the plaintiff, the judgment recovered therein is conclusive as against the defendant as to all questions of fact determined. (*Heiser v. Hatch*, 86 N. Y. 614; *Adams v. Conover*, 87 id. 422; *Bridgeport Ins. Co. v. Wilson*, 34 id. 274; *City of Rochester v. Montgomery*, 72 id. 67; *Train v. Gould*, 22 Mass. 380.) Evidence of a usage among banks as to the examination of the genuineness of indorsements was properly rejected. (*Security Bk. v. Nat. Bk. of the Republic*, 67 N. Y. 455; *Fuller v. Robinson*, 86 id. 306, 309; *Woodruff v. Merchs.' Bk. of N. Y.*, 25 Wend. 673-674; *Merchs.' Bk. v. Woodruff*, 6 Hill, 174; *Bowen v. Newell*, 8 N. Y. 190; *Otsego Co. Bk. v. Warren*, 18 Barb. 295; *Wadley v. Davis*, 63 id. 502; *Perkins v. Pres'dt, etc., F. Bk.*, 21 Pick. 483; *Newbold v. Wright*, 4 Rawle [Penn.], 194; *Brown v. Jackson*, 2 Wash. C. C. 24; *Dodd v. Farlow*, 11 Allen, 426; *Reed v. Richardson*, 98 Mass. 216; *Stoeber v. Whitman*, 6 Binn. 416; *Bolton v. Colder*, 1 Watts [Penn.], 360; *Eager v. Atlas Ins. Co.*, 14 Pick. 141; *Randall v. Rotch*, 12 id. 107; *Merchs.' Nat. Bk. of Whitehall v. Hall*, 83 N. Y. 388, 345; *Agawam Bk. v. Strever*, 18 id. 502, 512.) The defendant by its indorsement of the check and collection

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of the money stands in the position of the indemnitor to the plaintiff, and having had notice of the suit against plaintiff, is liable for the costs and expenses of such action. (*Thompson v. Taylor*, 72 N. Y. 32; *Elwood v. Deifendorf*, 15 Barb. 398-413; *Turnbull v. Bowyer* 40 N. Y. 461; *Babcock v. Beman*, 11 id. 200; *Erwin v. Downs*, 15 id. 575; *Jones v. Brooks*, 4 Taunt. 466; *Hubble v. Brown*, 16 Johns. 70; *Baker v. Martin*, 3 Barb. 635; *Whitney v. Nat. Bk. of Potsdam*, 45 N. Y. 303; *Delaware Bk. v. Jarvis*, 20 id. 226, 240; *Coolidge v. Bingham*, 5 Metc. 68; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Kip v. Brigham*, 7 Johns. 167; *O'Brien v. McCann*, 58 N. Y. 373; *Fisher v. Fallows*, 5 Esp. 171; *Whipple v. Newton*, 17 Mass. 169; *Hart v. Deamer*, 16 Wend. 538; *Howe v. B., N. Y. & E. R. R. Co.*, 37 N. Y. 297; *People, ex rel. Van Keuren, v. B'd of Auditors*, 74 id. 310.)

DANFORTH, J. The general question involved is answered by a series of decisions by this court in favor of the respondent. There is no imputation on the defendant with regard to the way in which it took the check of Kunhardt & Co., or the use made of it, but the plaintiff was thereby induced to part with its money without consideration, and the defendant, who received it, is bound to make restitution, unless the plaintiff, by some act or omission of its own, has lost the right to demand or sue for it. (*White v. Continental Nat. Bank*, 64 N. Y. 316; and cases there cited by ALLEN, J., 21 Am. Rep. 612.)

The appellant contends that it was the plaintiff's duty to examine and ascertain the genuineness of the payee's indorsement before paying the check, and that in default of doing so, it is as against the defendant estopped from denying its genuineness; but the authorities are the other way. (*Canal B'k v. Bank of Albany*, 1 Hill, 287; *Whitney v. Nat. Bank of Potsdam*, 45 N. Y. 303; *Holt v. Ross*, 54 id. 472; 13 Am. Rep. 615; *The Union Nat. B'k of Troy v. Sixth Nat. B'k of N. Y.*, 43 N. Y. 452; 3 Am. Rep. 718; *White v. Cont'l Nat. B'k*, *supra*; *Graves v. Am. Exch. B'k*, 17 N. Y. 205.)

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The recovery, however, should have been limited to the amount of money received by the defendant from the plaintiff, with simple interest to the time of the rendition of the verdict. The plaintiff paid the check of Kunhardt & Co. at its own risk and without authority, and could have no defense to their action. (*Hall v. Fuller*, 5 B. & C. 750 ; *Morgan v. The Bank of the State of N. Y.*, 11 N. Y. 404.) There was no privity between Kunhardt & Co. and this defendant. The money received by it was not their money, and it was not liable to them. Their money was still on deposit with the plaintiff, and the plaintiff owed them for it.

The cases cited by the plaintiff are not analogous. *Elwood v. Deifendorf* (5 Barb. 398) and *Thompson v. Taylor* (72 N. Y. 32) stand upon the technical relation of principal and surety, and even then the right to indemnity was held not to extend to expenses incurred in defending against the just claim of the creditor. In *Delaware Bank v. Jarvis* (20 N. Y. 226) the defendant was the vendor of the note in question, and had received from the plaintiff the agreed price thereof. The costs in controversy were incurred in an action which failed because the note was void for usury taken by the vendor, and the recovery for costs allowed in that action was upheld upon the ground that the vendor of a chose in action impliedly warrants its soundness and validity, so far at least as he had been connected with its origin. In the other cases cited by the respondent, the plaintiff had become liable to costs in actions in which he had a remedy over against the then defendant, but in none of them did it appear that the action in which the costs were incurred was caused in whole or in part by the wrongful act or omission of duty on the part of the original defendant. No case I think can be found in which the right to costs of defending an action so caused has been upheld, and that is precisely the position of the plaintiff here. It did not buy or propose to buy the check of the defendants ; it assumed to pay it as the obligation of Kunhardt & Co., and when informed by them that the condition — indorsement by payee — on which alone they authorized payment, had not been performed, they

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took the risk of defeat by joining issue with their principals, and withheld their money until it could be determined. It was the business of the plaintiff as between itself and its depositors, to see to it that their money should not be expended except as they directed (*Weisser v. Denison*, 10 N. Y. 68; *Morgan v. Bank of State of N. Y.*, *supra*; *Graves v. Am. Exch. B'k*, *supra*; *Welsh v. German Am. B'k*, 73 N. Y. 424; 29 Am. Rep. 175), and having failed to do so, cannot charge the expense of an action caused by such default upon a third party. The defendant's liability in the present action stands upon a different and entirely distinct ground — the receipt of money paid under a mistake and without consideration. The same principle forbids rests in the computation of interest upon the amount paid.

Another proposition has been very strenuously argued for the appellant, to the effect that the court erred in excluding evidence offered to show, that by usage among banks in the city of New York it was the duty of the plaintiff to examine and satisfy itself as to the genuineness of the signatures of the drawer and payee of the check, and return the same immediately if not good.

The action before us is to recover money to which in conscience and good morals the defendant has no title, and it seeks to retain it upon the ground that by the custom of its kind within a certain city, its payor must at its peril ascertain whether a defect in title existed. Such an obligation might have been created by contract, and so a short statute of limitations imported into the transaction, or a limited period defined, after which the payor should be required to hold its peace; but this is contrary to the legal rights of the parties as fixed by the circumstances of the transaction, and I find no authority which gives that effect to a local usage, or permits it: to be received in contradiction of the law merchant.

In *Rankin v. American Insurance Company* (1 Hall, 619) it was thought to be well settled that a usage could never be set up to contradict a rule of law, or to vary an express agreement, and on that ground it was decided that when by their

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policy, insurers bound themselves to pay for all damages arising from perils of the sea, evidence of usage, in the port of New York, and elsewhere, that the insurer is not liable until upon survey made by certain officers it is found that the goods were properly stowed and that the damage arose from perils of the sea, is inadmissible, as varying the obligation and introducing a condition precedent into the contract. The same rule applies where usage is offered to oppose or alter a general principle or rule of law, and upon a given state of facts, make the legal rights or liabilities of the parties other than they are by the common law. In *Frith v. Barker* (2 Johns. 327), KENT, Ch. J., says usage "never is, nor ought to be, received to contradict a settled rule of commercial law." *Brown v. Jackson* (2 Wash. C. C. 24) was an action by the holder of a bill of exchange, against an indorser; the latter in defense offered to prove a custom that in the trade between this country and England, the English merchant receiving a bill, indorsed as the one in question was, must return it immediately on protest to the indorser; that if he call on the drawer for payment, he exonerates the indorser. It was held inadmissible as contrary to the established rule of law relating to such a subject. In *Barnard v. Kellogg* (10 Wall. 383) it is said, "If on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made." In the case before us the common law did not on the admitted facts impose the duty of examination of the check on the paying bank, and we think no custom can be admitted to imply one. Whatever tends to unsettle the law and make it different in different portions of the State, would lead to mischievous consequences, and be against public policy (*Thompson v. Ashton*, 14 Johns. 317), and so it has been frequently held.

In *Woodruff v. Merchant's Bank* (25 Wend. 673) a usage in the city of New York that days of grace were not allowed on a bill of exchange was held to be illegal. NELSON, J., saying, "if sanctioned, its effect would be to overturn the whole

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law on the subject of bills of exchange in the city of New York, and it could not be allowed to control the settled and acknowledged law of the State in respect to this description of paper." There are cases in this court standing on the same doctrine. (*Security Bank v. Nat. Bank of the Republic*, 67 N. Y. 458 ; 23 Am. Rep. 129 ; *Fuller v. Robinson*, 86 N. Y. 306 ; 40 Am. Rep. 540.)

The plaintiff here had no means of knowledge of the character of the payee's indorsement, beyond those possessed by the defendant, nor, under the common law, was its duty of examination greater. (*Frank v. Lanier*, decided January, 1883.*). It cannot be charged with it, by proof of usage, without changing the law applicable to such transactions.

We think, therefore, the appellant's proposition in this respect was properly denied by the trial court, but for the reasons above stated, the judgment must be reversed, and a new trial granted, unless the plaintiff stipulates to reduce the judgment to an amount equal to \$19,000, with interest from November 10, 1874, to date of verdict, and costs in the courts below, in which case the judgment so modified should be affirmed, without costs to either party in this court.

All concur, except RAPALLO, J., absent.

Judgment accordingly.

IRA H. BROOKS, Respondent, v. ELVIRA HARISON et al., as Administrators, etc., Appellants.

The complaint, in an action for libel, alleged the writing and sending by defendant of a letter which contained the matter claimed to be libelous. At the beginning of the trial and before any evidence had been given, defendant objected to any evidence, on the ground that the letter was a privileged communication, which objection was overruled. At the close of plaintiff's evidence a motion was made for a nonsuit on the ground "that if the letter was not a privileged communication the proof showed that plaintiff had sustained no damage * * *, and the letter was not libelous on its face." *Held*, that the question as to whether the letter was a privileged communication was not effectively raised ; that it was

* Post. p. 112.

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not presented by the motion for nonsuit, and the preliminary objection was unavailing, as there were then no facts before the court upon which it could be determined.

The complaint also charged the speaking of alleged slanderous words, which were substantially that plaintiff was offering for sale to a cheese factory, the milk of his dairy which was poisonous and impure, by reason of his suffering a horse having a sore upon its neck, discharging filthy and impure matter, to run in the pasture with his cows, and drink from the same water and share the same food. Defendant claimed upon the trial, upon the testimony of experts called by him, that the necessary consequence of the facts stated was to render the milk impure and poisonous. *Held*, that assuming this to be true, the words charged a misdemeanor (§§ 1, 2, chap. 544, Laws of 1884) and were actionable *per se*.

It appeared that three different cheese factories refused plaintiff's milk, assigning as a reason the charge made by defendant. *Held*, that assuming the words were not actionable *per se*, there was sufficient evidence of special damage to authorize the submission of the question to the jury. The court charged in substance that if the jury found the alleged wrong to have been malicious and intentional, they could give exemplary damages, in determining which they might consider the injury to plaintiff's feelings and have respect to the force of example. *Held* no error.

(Argued December 7, 1882; decided January 16, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, May 4, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action for libel and slander; it was brought originally against Richard F. Harison, who died after the argument of his appeal at General Term, and before the decision, and the present defendants were substituted.

As to the libel, the complaint charged defendant falsely and maliciously wrote and mailed a letter "to A. Aldrich & Company and others at the city of Boston and State of Massachusetts, and therein falsely and libelously uttered and published of and concerning the plaintiff the following false and libelous words, namely: Ira Brooks has a sick and diseased horse on his farm; he owns and has a sick and diseased horse in his possession. That horse discharges from his head and neck filthy and poisonous virus or matter. Brooks kept his horse on his farm

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with his dairy of cows. The milk he produced was tainted. The milk he got from his cows was tainted, filthy and poisonous and wholly unfit for food. The virus and matter discharged from his horse poisoned the milk produced from his cows, and the butter and cheese made from the milk of his cows was filthy, poisonous, rotten, rancid, sour and not fit for food; and the butter and cheese that he has offered for sale was filthy, rancid, poisonous and unfit for food and infected by the poisonous matter from such horse. That Brooks kept his sick horse on his farm with his dairy of cows; that while the horse was with the cows and while occupying the same pasture with the cows, the horse discharged from his head and neck large quantities of offensive and poisonous virus; that while the horse was with the said cows the said Brooks knew that his horse was sick with a contagious disease and that the horse discharged from his head and neck offensive, poisonous and filthy virus or matter. That while the horse was sick and discharging such matter Brooks was engaged in making butter from his cows and selling and offering to sell such butter as good and wholesome food, which Brooks knew to be infected, diseased and poisonous, rotten, rancid and sour, and wholly unfit for food. That the butter that he had sent to Boston to said A. Aldrich & Company was infected with the disease and virus of the said horse, was filthy, poisonous, rotten, rancid and sour, unfit for use and consumption and unwholesome as food, and the said A. Aldrich & Company and others were warned not to sell the same or any part thereof, or offer the same or any part thereof for sale for the reasons aforesaid; thereby intending to charge that the said plaintiff had knowingly sold and exposed for sale impure, adulterated and unwholesome milk, butter and cheese; and had knowingly, maliciously and criminally adulterated milk with the view of offering the same for sale; and had knowingly, maliciously and criminally kept cows for the production of milk, butter and cheese for market and for sale in an unhealthy condition; and had knowingly, maliciously and criminally sold and offered for sale filthy, poisonous and infected milk, butter,

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cheese and food." The slanderous words charged were of a similar import.

At the opening of the trial, defendant's counsel objected to any evidence being received, on the ground that the counts of the complaint charging slander did not allege the speaking of words actionable *per se*, or that by the utterance of the words plaintiff had suffered any special damage; that the letter referred to was a privileged communication. The objection was overruled and exception taken. The further material facts appear in the opinion.

A. X. Parker for appellants. Plaintiff's evidence failed to establish the speaking of any words by defendant charging plaintiff with the commission of an offense indictable under any statute of the State or at common law, nor were the words spoken by plaintiff slanderous *per se*. (2 Broom and Hadley's Com. 460 [Am. ed.]; 2 Colby's Crim. Law, 77; *Moses v. Mead*, 1 Denio, 378; *Wright v. Hart*, 18 Wend. 440, 464; *Vicars v. Wilcox*, 8 East, 1; *Maybee v. Fisk*, 42 Barb. 326; *Matthews v. Beach*, 5 Sandf. 256; *Baker v. Wilkins*, 3 Barb. 220; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *Roberts v. Champlain*, 14 Wend. 120; *Anonymous*, 60 N. Y. 262; *Terwilliger v. Wands*, 17 id. 54, 57; *Kelly v. Partington*, 5 B. & Ad. 695; *Bassil v. Elmer*, 65 Barb. 627; *Kendall v. Stone*, 50 N. Y. 14; *Daily v. Dean*, 5 Barb. 297; *Linden v. Graham*, 1 Duer, 670.) Whether defendant made the statements or wrote the letter in the conscientious discharge of what he believed to be his official duty, and whether either of the statements or letter was privileged were questions for the jury. (*Clapp v. Develin*, 35 N. Y. Supr. Ct. 170; *Lewis v. Chapman*, 16 N. Y. 369, 374; *Armsby v. Douglass*, 37 id. 477, 479, 484; *Klinck v. Colby*, 46 id. 427, 433-4; *Hamilton v. Eno*, 81 id. 116, 124.)

Leslie W. Russell for respondent. The utterance that plaintiff sold or offered to sell milk which had become poisonous or deleterious as food, or drew such milk to the

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factory to be manufactured into cheese, or into butter is a slanderous charge, actionable *per se* as an assertion of offering for sale or use unwholesome food knowingly. (*Hemmaway v. Wood*, 1 Pick. 524; *Brooker v. Coffin*, 5 Johns. 187; *Demarest v. Haring*, 6 Cow. 76; Bishop's Crim. Law, §§ 940, 945; 1 R. S. [6th ed.] 1105, §§ 34, 35, 36, 37; *Williams v. Holbridge*, 22 Barb. 396; *Hewett v. Mason*, 24 How. Pr. 366; 2 Starkie on Slander, 108; *Burgess v. Boucher*, 8 Mod. 240; *Sherwood v. Chase*, 11 Wend. 38; *Chapman v. Smith*, 13 Johns. 78.) The burden is always on the party uttering the alleged slander, to show that he deprived the charge of its force by an explanation, which necessarily limited his meaning, so as to be innocuous. (*Maybee v. Fisk*, 42 Barb. 326; *Van Akin v. Caler*, 48 id. 58; *Philips v. Barber*, 7 Wend. 439; *Kennedy v. Gifford*, 19 id. 296; *Van Auken v. Westfall*, 14 Johns. 233; *Gorham v. Ives*, 2 Wend. 534; *Rundell v. Butler*, 7 Barb. 260.) It is slander to charge dishonesty, or turpitude, or unfitness, by reason of fault upon a business man concerning his business, or vocation, and no special damage need be proven. (*Fowles v. Bowen*, 30 N. Y. 20; *Dolan v. Van Rensselaer*, 1 Johns. Cas. 330; *Mott v. Comastock*, 7 Cow. 654; *Sewell v. Catlin*, 3 Wend. 291; *Carpenter v. Dennis*, 3 Sandf. 305.) Even if the words spoken were not actionable *per se*, they were uttered concerning the plaintiff in his vocation and business, and as a matter of fact his ability to manufacture cheese and butter without let or hindrance, or to use or sell his milk was so seriously impaired and prevented that even had he been unable to prove actual damages in dollars and cents, such might properly be inferred from the circumstances. (*Keenholts v. Becker*, 3 Denio, 346; *Olmstead v. Miller*, 1 Wend. 506; *Olmstead v. Brown*, 12 Barb. 657; *Hartley v. Herring*, 8 Term R. 130; *Moore v. Meagher*, 1 Taunt. 39.) Written words published of a man which impute to him injustice, or impropriety, or which tend to expose him to hatred, contempt, contumely or disgrace, are actionable. (*Cooper v. Stone*, 24 Wend. 433-440; *Riggs v. Denniston*, 3 Johns. Cas. 198; Townshend on Slander, § 176;

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Gorham v. Ives, 2 Wend. 534; *White v. Delavan*, 17 id. 49.) There is no justification for claiming that the letter was privileged. (*Kelly v. Partington*, 4 B. & Ad. 700.) The letter was libelous *per se*, and the words spoken were actionable *per se*, as imputing a crime. They were also actionable *per se*, because spoken of the plaintiff in his business and vocation in such a way that their natural import would occasion damage, and were actionable as producing special damages under the proofs in the case. (*Boynton v. Boynton*, 43 How. 383.) The request to rule that plaintiff was not entitled to recover for injury to his feelings was properly refused. (*Cunning v. Williamstown*, 1 Cush. 451; *Kendrake v. McCrary*, 11 Ga. 603; *Life v. Eisenlord*, 32 N. Y. 237; *Badgley v. Decker*, 44 Barb. 577; *Swift v. Dickerman*, 31 Conn. 285; *Taylor v. Church*, 8 N. Y. 461; *Tillotson v. Cheatham*, 3 Johns. 56; *Terwilliger v. Wands*, 17 N. Y. 54; *Wilson v. Gait*, id. 442; *Ford v. Jones*, 62 Barb. 484.) The exception to the ruling that punitive damages might be given as a warning to others to prevent a repetition is correct. (*Taylor v. Church*, 8 N. Y. 461; *Tillotson v. Cheatham*, 3 Johns. 56; *Cook v. Ellis*, 6 Hill, 467; *Burr v. Burr*, 7 id. 207; *Kendall v. Stone*, 2 Sandf. 269.)

FINCH, J. The recovery in this action was for libel and slander. That the letter to Aldrich & Co. was libelous on its face is not now disputed. Whether it was true or not was a question of fact upon which the jury have passed, and upon evidence sufficient at least to put their conclusion beyond our review. The only other defense asserted is that of privileged communication. The question, however, was not effectively raised. At the beginning of the trial, before any evidence had been given, and in the entire absence of the facts and circumstances attending and characterizing the letter, the defendant objected to any evidence being given, on the ground that the letter was a privileged communication, which objection was overruled and an exception taken. It is not even now contended that this ruling was wrong, made at a time when there

was nothing before the court upon which the question sought to be raised could be determined, but it is sought to broaden the motion for a nonsuit, made at the close of plaintiff's case, by making it relate back to these preliminary objections and transferring them by an intendment or inference into the grounds of nonsuit actually stated. These were, so far as the count for libel is concerned, that "no proof had been given to sustain it; that if the letter was not a privileged communication, the proof showed that plaintiff had sustained no damage by reason of it; and the letter was not libelous on its face." This objection not only does not raise the question now sought to be argued, but practically concedes and abandons the point; and nowhere else during the progress of the trial was it again referred to. No ruling was sought or obtained from the court as to whether the letter was written upon excusable occasion, and was privileged in view of the circumstances in which it originated. That question only was for the court, and was not raised in such manner as to be now before us. The question of good faith and belief in the truth of the statement was for the jury. (*Hamilton v. Eno*, 81 N. Y. 122.) We may, therefore, dismiss any further consideration of the letter except as it becomes connected with questions which concern likewise the alleged slanderous words.

The defendant contends that these were not actionable *per se*. They consisted substantially of a charge that the plaintiff was selling or offering for sale to a cheese factory the milk of his dairy which was poisonous and impure by reason of his suffering a mare, having a sore upon its neck discharging filthy and putrid matter, to run in the pasture with his cows, and drink from the same water, and share in the same food. The court did not charge that these words constituted an accusation of an indictable offense, unless the jury found as a fact that the impurity and poisonous quality of the milk was a necessary consequence of the facts related and detailed. Assuming that to be true, and the defendant so claimed upon the testimony of experts called by himself, the accusation became one of selling and offering for sale poisonous and impure milk, rendered so by

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causes which necessarily produced such impurity and which were wholly within the plaintiff's control. Such an act constituted a misdemeanor. (Laws of 1864, chap. 544, §§ 1 and 2.) One who shall "knowingly sell or exchange, or expose for sale or exchange, any impure, adulterated or unwholesome milk," or "who shall keep cows in a crowded and unhealthy condition, or feed the same on food that produces impure, diseased or unwholesome milk," is guilty of a misdemeanor. The accusation here was that the plaintiff had delivered to the cheese factory poisonous milk, was preparing to do so again, and was giving his cows food and water contaminated with poisonous and unwholesome elements, and the charge did relate to the production of unwholesome milk and its sale or exchange as such. The ruling was certainly not erroneous as against the defendant.

It is contended that the accusation was not slanderous because explanatory words were used which showed that there was an expression of opinion merely as to the consequences of plaintiff's action. But what are called the explanatory words were the very seat of the slander and the origin of its force and power to harm. Instead of an explanation tending to modify and render innocuous the charge of selling impure milk, it was one which strengthened and intensified the charge by stating the facts from which, on the theory we are now considering, such impurity followed as a natural and necessary consequence. We find no error, therefore, in the ruling of the court as to the actionable character of the slanderous words.

But since, under the charge of the court, the jury were at liberty to reach their conclusion upon the ground that the words spoken were not actionable *per se*, because the impurity of the milk was not the necessary consequence of the exposure of the cows to poisonous food and drink, it becomes necessary to consider the case in connection with the subject of special damage. Upon this latter hypothesis the court charged that special damage must be shown, and held on the motion for a nonsuit, that *prima facie* it had been established. It was shown that three different cheese factories refused plaintiff's milk, as-

signing as a reason the charge made by Harison and his threat to institute proceedings if his warning was disregarded. There was enough in these facts to require a submission of the question to the jury.

It is, however, again said that explanatory words were used, and that Harison gave merely an opinion founded upon facts, and since we are to assume now that the impurity of the milk was not an inevitable result of the facts detailed, it follows that others might, and the proofs show that they did, reach a contrary conclusion. But these facts tended to show that the milk was impure. They certainly cast suspicion upon it, in and of themselves; and if falsely stated, were calculated to do the plaintiff as much injury, and harm his reputation as a man and in his business as severely, as if the impurity of the milk he sold was a certain instead of a probable result. So that outside of mere opinion, facts were stated which naturally led to the injurious inference, which were intended to point that way, which were followed by the inference distinctly drawn, and which accomplished the meditated result. Enough was shown to warrant the conclusion of special damage sustained.

But it is argued that the superintendents of the cheese factories refused plaintiff's milk because of Harison's threat to prosecute and not because they believed the milk to be impure. But the threat to prosecute got all its force from the facts narrated as its basis. It showed a possible foundation on which complaint could rest, and a door open to an opinion possibly different from their own, if, as the appellant claims, they really did believe in the purity of the milk. How far they were influenced by the threat alone, and how far by the facts detailed is very much a matter of speculation. It is enough that the only legal proposition which the defendant asked the court to charge on this branch of the case was charged as requested, the learned judge saying that the plaintiff could not recover for a refusal occasioned by Harison's threats.

The remaining exceptions are aimed at the charge relating to punitive or vindictive damages. That such might be awarded in a case of this character is not denied, and what was said of

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the injury to plaintiff's feelings and of a warning to others had relation to exemplary damages alone. It was not pretended that those considerations were elements of the actual damages founded upon the idea of compensation, but when the jury got beyond that, they might if they found the wrong to be malicious and intentional give exemplary damages, in determining which they might consider the injury to plaintiff's feelings and have respect to the force of the example. We think the charge was not erroneous in these respects. (*Taylor v. Church*, 8 N. Y. 452; *Hunt v. Bennett*, 19 id. 175.) For such purpose the jury must necessarily be left to consider all the facts of the case.

While the damages awarded by the jury may seem and may be disproportioned to the offense, and their conclusion upon the facts not beyond criticism, we cannot interfere with the judgment which they exercised.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

CHARLES H. BOWNE, Respondent, v. ELLIOT LYNDE, Respondent, WILLIAM H. BOWNE, Appellant.

Where a purchaser of part of mortgaged premises assumes to pay the mortgage as part of the purchase-money the portion so purchased becomes, in equity, the primary fund for such payment.

In an action to foreclose a mortgage covering two farms it appeared that L., the mortgagor, conveyed one of the farms to K., the latter assuming to pay, as part of the purchase-money, \$2,500 of the mortgage. L. had contracted to purchase a piece of land of B., who agreed to take the bond of K., secured by mortgage on the farm so to be conveyed to him for part of the purchase-price, and concurrently with the conveyance from L. to K., the latter executed his bond and mortgage to B., who conveyed to L. as agreed. B. knew, when he took his mortgage, of the existence of the prior mortgage and of K.'s assumption of a portion thereof. *Held*, that the judgment properly directed the sale first of the farm conveyed to K.; that the circumstances under which the mortgage to B. was given did not change the equitable rights of the parties.

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K. subsequently reconveyed the farm to L. who, in consideration thereof, agreed to and did convey ten acres of the farm to the wife of K., built a house thereon and procured a release thereof from the B. mortgage and agreed to protect it from the lien of the mortgage in suit. L. obtained the release from B. by giving him a guaranty to pay \$250 of his mortgage. *Held*, that this did not change the equities of the parties; that if the legal effect of the reconveyance was to release K. from his contract of assumption no right of B. was affected and the release did not inure to his benefit.

(Argued December 7, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 20, 1881, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant Lynde to the New York Mutual Life Insurance Company to secure his bond for the sum of \$4,200, which mortgage was assigned to plaintiff.

The controversy was between Lynde and defendant William H. Bowne. The mortgage in suit was executed in July, 1871, it covered two farms, one known as the Gouverneur farm, the other as the Rossie farm. In March, 1876, Lynde sold to defendant Kelsey the Rossie farm for \$6,400, and at the same time bought of defendant William H. Bowne seventy-five acres of land for \$3,000. Kelsey paid W. H. Bowne the \$3,000, in pursuance of an agreement between the three parties, as follows: He assigned to Bowne a bond and mortgage which he, Kelsey, held on other lands for \$800, and he gave to Bowne a mortgage on the Rossie farm for \$2,200. It was a part of the agreement and understanding between the three parties that Kelsey was to assume and pay upon the insurance company mortgage the sum of \$2,500 as and for a part of the purchase-price of the Rossie farm, and William H. Bowne took his mortgage for \$2,200, with full knowledge of such fact. The remainder of the \$6,400, to-wit, \$900, Kelsey secured to Lynde by a mortgage upon the Rossie farm, subject to the two other mortgages. Wil-

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liam H. Bowne supervised the execution of the foregoing arrangements, and he still holds the \$2,200 bond and mortgage given him by Kelsey as aforesaid. In December, 1876, in pursuance of a contract between Lynde and Kelsey, the latter reconveyed the Rossie farm to the former, who satisfied the \$900 mortgage thereon, conveyed ten acres thereof to Mrs. Kelsey, built a house thereon, and procured the ten acres to be released by defendant Bowne from the lien of his \$2,200 mortgage; he also agreed to protect the ten acres from the lien of the insurance company mortgage. Judgment was rendered declaring the mortgage of defendant Bowne subject to \$2,500 of plaintiff's mortgage, ordering the Rossie farm, excepting the ten acres, to be first sold, and \$2,500 of the plaintiff's mortgage, with unpaid interest thereon, to be paid plaintiff out of the proceeds, remainder, if any, to be paid defendant Bowne to the amount unpaid upon his mortgage. If necessary the Gouverneur farm was ordered to be sold and the proceeds to be applied in payment of the balance of plaintiff's mortgage.

Leslie W. Russell for appellant. The intent of Lynde cannot contravene the legal effect of his agreement with appellant. (*Schryver v. Teller*, 9 Paige, 173; *Kellogg v. Rand*, 11 id. 60; *Skeels v. Spraker*, 8 id. 182.) The foreclosure of the lien, to which a security given by the debtor in satisfaction of his own debt is subject, revives the debt of his debtor and makes him equitably bound to satisfy the security thus rendered valueless. (*Thomas v. Austin*, 4 Barb. 265.) If the arrangement of March 8, 1876, bore the legal construction the court has put upon it, the rescission of that trade restored Kelsey to his original rights, relieved him of the obligation to pay the \$2,500, and made him simply a surety of Lynde for the \$2,200 owing appellant. (*Fairchild v. Lynch*, 46 N. Y. Supr. Ct. 1.) The reconveyance charged the Gouverneur farm primarily, even though Lynde had not been personally liable for the debt. (*Hopkins v. Wooley*, 81 N. Y. 77.) By the transaction of December, 1876, Lynde has destroyed the security afforded by the obligation of Kelsey, which appellant had the right to rely upon, and

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which the court, to destroy appellant's equity, found to be binding on appellant, and therefore, apart from all other reason, he is in equity bound to save the appellant harmless from the effect of such a release, even if he does not become personally liable to pay the bond and mortgage of the appellant. (*Calvo v. Davies*, 73 N. Y. 215; *Marshall v. Davies*, 78 id. 421; *Develin v. Murphy*, 56 How. Pr. 327.)

V. P. Abbott for respondent. The rule that the mortgaged premises, when the mortgage covers several parcels of land, shall be sold in the inverse order of alienation, is a rule of equity merely and liable to be varied by the equities of the case or by agreement of the parties. (*Patty v. Pease et al.*, 8 Paige, 277-284; *Wood v. Spalding*, 45 Barb. 602; *Guion v. Knapp*, 6 Paige, 35.) Had the premises been conveyed by Kelsey to any person other than the original vendor, no question seemingly could have arisen as to the liability of this farm to contribute \$2,500 to the payment of the life insurance mortgage anterior to any payment upon the mortgage of defendant Bowne. (*Russell v. Pistor*, 7 N. Y. 171.) The reconveyance of the farm by Kelsey to Lynde was a mere conveyance of the equity of redemption, and by express agreement was not to change the relation of pre-existing liens except as to Lynde's individual mortgage, and except as to the ten acres released to Kelsey's wife. (*Cliff v. White*, 12 N. Y. 519; *Sheldon v. Edmonds*, 35 id. 235.) The consideration expressed in the deed from Kelsey to Lynde is not conclusive of his liability and is evidence only to support the conveyance. (*Wheeler v. Billings*, 38 N. Y. 263; *Murdock v. Gilchrist*, 52 id. 247; *Spicer v. Spicer*, 16 Abb. [N. S.] 127.)

ANDREWS, CH. J. Upon the sale of the Rossie farm by Lynde to Kelsey, the latter assumed to pay as part of the purchase-money, \$2,500 of the mortgage to the Mutual Life Insurance Company, which covered the Rossie farm, and the Gouverneur farm also owned by Lynde. As the result of this arrangement, the Rossie farm, as between Lynde and Kelsey, was

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primarily charged in equity with the payment of the mortgage debt assumed by Kelsey. For it is a plain rule of equity that where a purchaser of part of mortgaged premises assumes to pay the mortgage as part of the purchase-money the part of the premises so purchased becomes in equity the primary fund for the payment of the mortgage. (*Russell v. Pistor*, 7 N. Y. 171.) The Gouverneur farm, the title to which was retained, and is still held by Lynde, was, as a consequence of the assumption by Kelsey, secondarily liable for \$2,500 of the insurance company mortgage. The defendant Bowne took his mortgage from Kelsey, and is bound by the same equity. He knew of the existence of the mortgage to the Mutual Life Insurance Company and of Kelsey's agreement with Lynde when his mortgage was executed. Leaving out of view the subsequent reconveyance by Kelsey to Lynde of the Rossie farm in 1879, it is plain that Lynde is entitled to call upon the court to enforce in this action the settled equity as between a grantor of part of mortgaged premises and a grantee who had assumed the payment of the mortgage as a part of the purchase-money, and to compel a sale of the granted premises in the first instance in exoneration of his remaining lands. The fact that the Bowne mortgage was given by Kelsey at the request of Lynde in part payment for the seventy-five acres of land purchased by Lynde from Bowne concurrently with the sale by Lynde to Kelsey of the Rossie farm, does not alter the situation or change the equitable rights of the parties. It was a condition of the purchase by Lynde from Bowne that the latter should accept the Kelsey bond and mortgage in payment *pro tanto* for his land. If the bargain has turned out to be a bad one for Bowne, by reason of the depreciation in value of the Rossie farm, that risk was assumed by him when he accepted the bond and mortgage. Lynde did not join in the bond of Kelsey or become responsible in any way for the mortgage debt. It was doubtless supposed at the time by all the parties that the Rossie farm, for which (with a few articles of personal property) Kelsey agreed to pay to Lynde \$6,400, was ample security for \$2,500 of the insurance company mortgage

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and the \$2,200 mortgage from Kelsey to Bowne. But if by reason of the depreciation in the value of the land it will not pay both liens, there is no equity in saddling the loss on Lynde, thereby depriving him of the benefit of his bargain with Bowne. This, however, would be the consequence if, as the defendant Bowne insists, the Gouverneur farm shall be directed to be first sold. It would in effect be compelling Lynde to pay the Bowne mortgage out of his property. This he has never obligated himself to do. Nor were the equities of the parties changed by the reconveyance from Kelsey to Lynde of the Rossie farm. The consideration of the reconveyance was the discharge by Lynde of the bond and mortgage for \$900, taken from Kelsey for part of the original purchase-money on the sale of the Rossie farm and the conveyance by Lynde to Kelsey's wife of ten acres of the land, and his agreement to build a house thereon and to procure a release of the ten acres from the Bowne mortgage and to protect it against the lien of the insurance company mortgage. Lynde, in pursuance of his agreement with Kelsey, conveyed the ten acres to Mrs. Kelsey, and built a house thereon and procured Bowne to release it from his mortgage. The consideration of the release was the guaranty of Lynde to pay \$250 and interest on the Kelsey bond and mortgage. There was no agreement between Kelsey and Lynde that the latter should assume the Bowne mortgage. On the contrary he expressly refused to do so. The only obligation he assumed in respect to it was upon his guaranty to Bowne, and this was limited to the amount stated. Lynde acquired by the reconveyance the equity of redemption only. The situation of Bowne was not changed. His security was unaffected by the transaction. He had, as before, the mortgage and bond of Kelsey. Lynde was not bound to pay the insurance company mortgage for Bowne's protection. It was at his option to pay the liens on the Rossie farm or to allow the land to be sold thereon; and if he elected not to redeem, the land stood charged with the payment of the insurance company mortgage assumed by Kelsey. Bowne acquired no equity to have the whole burden of that mortgage shifted on to the Gouverneur farm by the

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reconveyance of the Rossie farm to Lynde. The original equities subsisted after as before that conveyance. It is claimed that by the reconveyance Lynde released Kelsey from his personal liability upon his contract of assumption. There was no express release of Kelsey, but if this was the legal consequence of the transaction, no right of Bowne was affected. He was not privy to that contract and it did not inure to his benefit, and gave him no right of action in case of Kelsey's default. The point that in the adjustment of the equities between the parties notice should have been taken of the fact that Lynde was indebted to Bowne on his guaranty, is not well taken. That was an independent contract, not noticed in the pleadings, and not affected by the determination of the issue, and no equitable grounds appear for allowing this claim as an equitable set-off on defense.

We think the judgment is right and that it should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

SETH R. ROBINS, Respondent, v. ANDREW ACKERLY, Appellant.

Certain letters patent executed by the colonial government of the Colony of New York, the first of which bears date November 30, 1666, granted to the freeholders of the town of H., Long Island, a tract of land described by metes and bounds, together with all "havens, harbors, * * * fishing," etc., within the specified limits. The north boundary is "the sound running betwixt Long Island and the maine." Within the east and west bounds of the patents lies Northport harbor, a land-locked harbor; Eaton's Neck, and Eaton's Neck beach, lying between it and the waters of the sound. *Held*, that said harbor was included in the grant, and the same having been confirmed by act of the colonial legislature (Act of May, 1691; 1 Bradford's Laws, 77), the title of the land under the waters of the harbor was thereby vested in the town, together with the exclusive right to oyster fishing therein.

91	98
116	61
91	98
130	461

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In 1879 the town leased to plaintiff a parcel of land under water in said harbor "to be exclusively used, occupied and enjoyed" by him "in the business of planting, growing, cultivating" oysters thereon. In an action for alleged trespass in taking up and injuring the oysters planted by plaintiff upon said land it appeared that said town had claimed title and an exclusive right to the land under water in the harbor, and to the fishing privileges from time immemorial; that it had regulated and exercised control over the fishing, and had made leases for marine railways and docks. *Held*, that the town had the right to execute the lease; that thereby it gave the plaintiff the exclusive right for the purposes specified; and that the action was maintainable.

Loundes v. Dickerson (34 Barb. 586), questioned and distinguished.

(Submitted December 11, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 10, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 24 Hun, 499.)

This action was for an alleged trespass in entering upon, taking up and injuring oysters planted by plaintiff in Northport harbor, Long Island.

Plaintiff claimed under a lease from the town of Huntington of the land under water whereon the oysters were planted. By the terms of the lease the plot of land covered by it was "to be exclusively used, occupied and enjoyed by the party of the second part (plaintiff), and to be so used, occupied and enjoyed in the business of planting, growing, cultivating thereon and removing therefrom, of oysters (not interfering with navigation) for the term of fifteen years."

The right of the town to make the lease was claimed under three letters-patent from the colonial governors of the colony of New York. The first was granted November 30, 1666, by Governor Nicolls. This was confirmed by a patent from Governor Dongan, dated August 2, 1688, and was again confirmed by Governor Fletcher, by patent dated October 5, 1694. The description of the lands granted is similar in the different patents. In the Nicolls patent it is as follows:

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"That is to say from a certaine river or creeke on the West com'only called by the Indyans by the name of Nackaquatok and by the English the Coldspring to stretch eastward to Nasaquack River, on the North to bee bounded by the Sound running betwixt Long Island and the Maine; and on ye South by ye sea including there nine several necks of Meadow Ground, all which tract of land together with the s'd necks thereunto belonging, within the bounds, limitts aforesaid, and all or any plantacon thereupon are to belong to the said Towne of Huntington as also all Havens, Harbors, Creekes, Quarryes, Woodland, Meadows, Pastures, Marshes, Lakes, Fishing, Hawking, Hunting and Fowling, and all other profitts, commodities, Emolum'ts and Heriditam'ts to the said land and premises within limitts and bounds aforementioned, described, belonging or in any wise appertaining."

The further material facts are stated in the opinion.

Thos. J. Ritch, Jr., for appellant. The main question of title to these lands under water in Northport harbor is "*res adjudicata*." (*Lowndes v. Dickerson*, 34 Barb. 586.) One cannot acquire an exclusive right of property in oysters planted in a bed where oysters grow naturally. (1 Wend. 237; *Osgood's Case*, 6 City H. Rec. 4; 14 Wend. 42; N. Y. Statute, 1866, chap. 753; 4 Barb. 592; 11 id. 298; 34 id. 586; 8 N. Y. 475.) The grant of the "haven or harbor," assuming the same to be valid, may have carried with it the soil and still left the fishery subject to the public right. (2 Blackst. Comm. 40; *Brink v. Richmyer*, 14 Johns. 265.) The general form and configuration of the coast line indicate the reason and the propriety of a different rule applying to the case of the South Bay and Northport harbor, even if the granting clauses of the respective patents were the same. (60 N. Y. 57.)

N. S. Ackерly and Thos. Young for respondent. The town of Huntington owns these lands and through their trustees (in whom is the legal title) can grant an exclusive use thereof. (Nicoll Patent, dated 1666, pp. 5-7; Dongan Patent, dated

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1688, pp. 7-17; Fletcher Patent, dated 1694, pp. 17-27; *The Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *People v. Van Rensselaer*, 9 id. 291, 346, 347, 348; *McCready v. State of Virginia*, 4 Otto, 391; First Constitution of State of New York, § 36.) The words "All harbors, havens, waters," used in the grants specifically identify the premises. (*Rogers v. Jones*, 1 Wend. 237; *People v. Vanderbilt*, 26 N. Y. 293.) The legal title to these premises is in the trustees of the town; they hold in trust for the benefit of the people of the town. (*Denton v. Jackson*, 2 Johns. Ch. 320; *Jackson v. Lowe*, 12 Johns. 252; *Foster v. Rhoads*, 19 id. 191; *Jackson v. Lawton*, 10 id. 23.) Prescription supposes and must be based on a supposed grant; in the case of a user by the public there is no grantee and no prescriptive right can be obtained. (*Munson v. Hungerford*, 16 Barb. 265; *Curtis v. Keesbi*, 14 id. 511; *Clements v. Village of West Troy*, 10 How. 199; *Post v. Pearsall*, 22 Wend. 425, 440; *Pearsall v. Post et al.*, 20 id. 121-125; *Bland v. Lipscombe*, 30 Eng. L. and Eq. 189, note.) The right to take and carry away fish such as is claimed here is in the nature of a profit, and is what was called in the early books "*profit a prendre*." (2 Washburn on Real Property [3d ed.], 276, subd. 3; Washburn on Easements [3d ed.], 126, § 21; id. [3d ed.], 6 and 7, § 6.) A right of "*profit a prendre*" cannot be gained by custom. (Washburn on Easements [3d ed.], 125, § 20.) It must be gained, if at all (when not claimed by grant), by prescription. (Washburn on Easements [3d ed.], 15, § 14; id. 125, § 20.) A town meeting has power to direct use of corporate property, etc. (1 R. S. [5th ed.], 87, § 9, subd. 5, 9, 11.)

MILLER, J. This action involves the right of the plaintiff to the use of land under water in Northport harbor, in the town of Huntington, Suffolk county, for the purposes of an oyster bed. The plaintiff's title is derived from a lease executed and delivered to him upon the 1st day of January, 1879, from the trustees of the town of Huntington, and the most important question involved is in regard to the legal

title of said trustees to the land in question and their right to grant the same for the purposes named in the lease.

The title of the town of Huntington is derived from several patents issued at different times by the colonial governors of the colony of New York, the first of which bears date on the 30th day of November, 1666, and the last upon the 5th day of October, 1694.

Upon the trial no question was made as to the eastern and western boundaries of the patents, and there was testimony establishing the other boundaries, and that the town had claimed title to the land covered by water in the harbor and the fishing privileges and from time immemorial treated the same as the property of, and as belonging to the town, and also claimed an exclusive right to the same. The evidence shows that it regulated and exercised control over the fishing and shooting in the waters of the harbor, had passed resolutions to prevent strangers, who were not inhabitants, from fishing therein, and had made leases for marine railways and docks, and had executed the present lease for the use of the land under water, therein described, for oyster fishing.

The judge upon the trial found that the title of the lands covered by water in Northport harbor, with the shell-fish growing thereon, was in the trustees of said town under ancient patents, and the testimony sufficiently sustains such finding.

The question arising as to the rights acquired and the effect to be given to grants of the character of those herein referred to were the subjects of consideration, and substantially passed upon by this court in the case of *The Trustees of Brookhaven v. Strong* (60 N. Y. 56), and it was there decided that by the common law the king had the right to grant the soil under water and with it the exclusive right of fishery, and that a grant by the colonial government confirmed by subsequent legislation conveyed an exclusive right to the oyster fishery.

The patents under which the claim was made in the case cited were issued about the same time and were of a similar import as those relied upon in the case at bar. A part of the

same South bay granted by the Brookhaven patents is also covered by the patents introduced in evidence upon the trial of this action.

The learned counsel for the defendant claims that a distinction exists between the two cases; that the *locus in quo* is different; that the charters and the surroundings were not the same, and that a continuous possession and use by the town, in the Brookhaven case, was relied upon to supply defects. It is true that the patents embraced different territories and the charters of the towns are not perhaps precisely the same in all respects, but a continuous possession and use of the land under water was an important part of the proof in the case at bar and greatly relied upon. Nor is there any serious question that the town exercised a control over the fisheries for a number of years so as to ripen into and strengthen its right thereto. Although the town did not lease any of the oyster beds until 1879, it did execute leases of other portions of the land covered by water and thus indicated its right to execute leases. It certainly as owner and as being in possession had a right to lease which is sufficient to uphold its claim to the land. The evidence that persons caught oysters there without paying for the privilege does not necessarily show that the town had no right to the oyster-fisheries and only furnishes some evidence which was to be weighed and considered by the court in determining the rights of the parties. The leases made show a more absolute title to the lands under water than a lease for fishing purposes, and in connection with the proceedings of town meetings and of grants for railroad purposes show that a claim has always been made of title, as well as to the right of fishery.

The fact that the trustees have allowed the lands to be enjoyed in common does not destroy their claim of title. Although the court say in the Brookhaven case that the elements of title derived from the patents were very much strengthened by possession and user, it disposes of the question of title mainly upon the authority of the patents themselves.

The counsel for the appellant claims that there is no recognition by the legislature of the title of the town of Huntington

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to the land under water of Northport bay or harbor. We think that the act of 1691, passed for the purpose of quieting and confirming titles, confirmed all royalties and other franchises which had been previously granted, and among these were those included in the charter of the town of Huntington. This is expressly held in the case of *Brookhaven v. Strong* (*supra*), and also in the case of *The People v. Van Rensselaer* (9 N. Y. 291). If the land in question is covered by the charters to which reference has been had, the cases cited dispose of the question at issue. We think it is established by sufficient evidence that the boundaries of the patents included the oyster bed which is the subject of this controversy. As already stated there is no question as to the western and eastern boundaries. The northern boundary of the town is the sound. This includes, we think, Northport harbor where the oyster beds in question are located. The language of the grant includes "all havens, harbors, creeks" as well as "fishing, hawking, hunting and fowling." In the *Brookhaven* case the south boundary, was the ocean, and there was a sandy flat or beach between the ocean and the bay, and the question was raised that the South bay was not within the grant. This court held that this objection could not be sustained and that the southern boundary which was the ocean, included the beach and of course the bay, etc. The patent under which the plaintiff claims is bounded on the north by the sound, adjacent to the sound is Eaton's neck and Eaton's neck beach, and south of this is Northport harbor. By analogy both Eaton's neck and Eaton's neck beach are within the patents and necessarily the harbor also. The boundary by the sound includes all the land south of the sound. That this was intended is indicated by the use of the words in the grant, "harbor, havens," etc. That Northport harbor was included within the limits of the boundaries was proved by the undisputed evidence of the surveyor and others. It was also proved that Eaton's neck beach was leased by the town. It should also be noticed that Northport harbor is land-locked and has always been used and distinguished as a harbor. It is very evident that there was testimony showing

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that Northport harbor was within the limits of the grant of the patents and, as a question of fact, which was determined by the findings of the court upon the trial and sustained by the General Term upon appeal, the subject is not now open for review.

The case of *Lowndes v. Dickerson* (34 Barb. 586) is relied upon by the counsel for the appellant. It was there held that the harbor of Northport was not within the limits of the town of Huntington, and the inhabitants thereof had not the exclusive right to take fish therein; that the right of fishing is a common right inherent in the people by the common law, and that nothing passed by the grant of the colonial government to the town by implication. It was there stated in the opinion that the weight of authority was adverse to the existence of any power in the British crown to grant to an individual the right to take fish in the sea and in an arm thereof in exclusion of the common liberty. Since that case was decided this court has held, as we have seen in the Brookhaven case, that the crown had authority to grant the town, as such, a right of fishery within its borders, thus overthrowing the doctrine enunciated in the case of *Lowndes v. Dickerson* (*supra*), and this case has been also overruled by the decision of the same General Term in the case at bar. The claim, therefore, that that case is conclusive as to this, and that the question is *res adjudicata* is, we think, not well founded. The defendant there claimed the right to take oysters as a citizen of the town of Huntington. Neither party had any title or lease from the town, and it may be assumed that in that case the proof did not entirely establish that the bay and harbor in question were within the limits of the town of Huntington, as is the fact here, and as the court found, and that proof was not produced to establish, as is the case here, that from time immemorial the trustees of Huntington treated the harbor in question and the land covered by water therein as under the control and belonging to the town, regulated the fishing and shooting, prescribed penalties for any infringement upon the right of fishery, made leases and performed other acts of ownership which evinced that they

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held title to the same. Nor does it appear that there was any proof in that case that Northport harbor was a land-locked harbor; that Eaton's neck and Eaton's Neck beach lay north thereof, and that the sound was north of this; in fact there was no proof that Northport harbor was actually south of the north boundary of the patent. These defects and deficiencies show that the case cited was different in these material and important features from the case now considered. They have been supplied by proof upon the trial in this case. The doctrine laid down in the Brookhaven case brings Northport harbor directly within the boundaries of the town of Huntington as established by the grants made to them, and the lease executed by the town was legal and valid. (See, also, *Rogers v. Jones*, 1 Wend. 237.)

We have examined the other questions raised by the counsel for the appellant and in none of them do we find any reason which would lead us to a conclusion different from that which has already been expressed, or to the reversal of the judgment, which was clearly right and should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

THE BANK OF BRITISH NORTH AMERICA, Respondent, v. THE
MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant.

On March 9, 1870, plaintiff, who had a deposit account with defendant, drew its check payable to the order of H. On the same day the check was certified by defendant's teller. On the next day it was presented by some person other than H., with her indorsement forged thereon, and was paid by defendant and the amount thereof charged to plaintiff. On March 17, 1870, in accordance with the usual course of dealing between the parties, plaintiff's pass-book was written up, balanced and returned; it contained the charge of the check, which was also delivered up as a voucher. Plaintiff had no notice or knowledge of the forgery until January, 1877; in June thereafter, it tendered the check and demanded

91	106
119	201
91	106
126	237

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of defendant payment of the amount thereof, and brought this action to recover the same in November, 1877. *Held*, that the action was not barred by the statute of limitations; that the certification did not make the check due without demand; that the payment upon the forged indorsement discharged no part of defendant's indebtedness; that plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account, and when it discovered the mistake, had the right to repudiate the charge, return the check and claim payment.

(Argued December 11, 1882; decided January 16, 1883.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 8, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 16 J. & S. 1.)

The nature of the action and the material facts are stated in the opinion.

John E. Burrill for appellant. The plaintiff had a perfect remedy at law to recover from the defendant the amount of the check, which had been improperly paid by defendant, and wrongfully charged against the plaintiff. (*Welsh v. Germ. Am. Bk.*, 73 N. Y. 424; *S. C.*, 1 Duer, 434.) In such action, the account stated would not have been a bar, or interfered with the recovery; it would only have been *prima facie* evidence, and could have been overthrown by evidence, and its only effect was to cast the *onus* on the plaintiff of showing its incorrectness. (*Lockwood v. Thorne*, 11 N. Y. 170; *S. C.*, 18 id. 287; *Welsh v. Germ. Am. Bank*, 73 id. 423.) As there was a perfect remedy at law, plaintiff could not resort to equity for the purpose of evading the statute applicable to legal actions, or obtaining the benefit of the statute applicable to equitable actions. (*Murray v. Coster*, 20 Johns. 576, 585; *Bible Society v. Helard*, 51 Barb. 552; *Smith v. Remington*, 42 id. 75; *Rundle v. Allison*, 34 N. Y. 180; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Bk. of U. S. v. Daniel*, 12 Pet. 32.) A perfect cause of action accrued to the plaintiff on the 9th of March, 1870, when the check in question was accepted and paid by

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defendant, charged to the plaintiff in its account, notice thereof given to the plaintiff, and the check and pass-book-balanced, were returned to the plaintiff. (*Kingman v. Hotaling*, 25 Wend. 423; *Parmenter v. Simonds*, 2 Bro. P. C. 43, 47; Chitty on Bills, marg. paging 515, 392, 28; *Carroll v. Cone*, 40 Barb. 220; *Baker v. Kenworthy*, 42 N. Y. 216; *Pratt v. Foote*, 9 id. 463; *S. C.*, 10 id. 599.) Ignorance on the part of the plaintiff of the facts which established the incorrectness of the charge is immaterial. The right of action had arisen. (*Union Bk. v. Knapp*, 3 Pick. 96.) The charge against the plaintiff by the defendant in the account rendered created a cause of action, and a demand was unnecessary. (*Union Bk. v. Knapp*, 3 Pick. 96.) When a demand is, under the circumstances, nugatory, even though it is an ingredient of a right of action, none need be made. (*McBride v. Farmers' Bk.*, 26 N. Y. 450; *Howard v. France*, 43 id. 593; *Bk. of Missouri v. Benoist*, 10 Mo. 521; *Watson v. Phœnix Bk.*, 8 Metc. 217; *Farmers' Bk. v. Planters' Bk.*, 10 G. & J. 422; *Carr v. Thompson*, 25 Alb. L. J. 92.) If a cause of action accrued to the plaintiff, as claimed by defendant, the statute of limitations began to run from that time, and when it began to run it could not be arrested or defeated by a new demand. (*Kelsey v. Griswold*, 6 Barb. 436; *Stafford v. Richardson*, 15 Wend. 302; *Allen v. Mille*, 17 id. 202; *Troup v. Smith*, 20 Johns. 33; *Argall v. Bryant*, 1 Sandf. 98; *Wood v. Carpenter*, 101 U. S. 135; *Taylor v. S. & N. A. R. R. Co.*, 13 Fed. Rep. 152.) In a case where, by reason of delay, the bank has lost its remedy, a depositor owes a duty to the bank to examine the account rendered and the vouchers. (*Thomson v. Bank*, 82 N. Y. 1-6.)

Ino. E. Parsons for respondent. The defendant was liable to pay the deposit to the plaintiff or to its order upon demand, but for the amount of the deposit an action could not be maintained until proper demand and refusal by the defendant. (*Howell v. Adams*, 68 N. Y. 314; *Bank of Fort Edward v. Washington Co. Nat. B'k*, 5 Hun, 605; *Boughton v. Flint*,

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74 N. Y. 476; *Phelps v. Bostwick*, 22 Barb. 314; *Girard B'k v. Bank of Penn. Township*, 39 Penn. St. 92.) No benefit resulted to the defendant from the fact that the plaintiff did not object to the charge of the check in its pass-book. The plaintiff had the right to rely upon the genuineness of Mrs. Halpine's indorsement. (*Welsh v. German Am. B'k*, 73 N. Y. 424.) The claim that the payment on the forged indorsement constituted a conversion of money of the plaintiff and so started the running of the statute is preposterous. (*Matter of Franklin B'k*, 1 Paige, 249; *Marsh v. Oneida Cent. B'k*, 34 Barb. 298; *Foley v. Hill*, 2 C. & F. 28; *Chapman v. White*, 6 N. Y. 412; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Graves v. Dudley*, 20 N. Y. 76; Story on Bailments, § 88; *Marine B'k v. Fulton B'k*, 2 Wall. 252; *Bank of the Republic v. Millard*, 10 id. 152; *Ætna Nat. B'k v. Fourth Nat. B'k*, 46 N. Y. 82; *Keene v. Collier*, 1 Metc. [Ky.] 415.) The statute would not begin to run till the discovery of the mistake. (Brown on Limitations, 517; *Brooksbank v. Smith*, 2 Y. & C. Exch. Chamber, 58; *Demys v. Schuckburg*, 4 Y. & C. 53; *McIntyre v. Warren*, 3 Abb. Ct. of App. Dec. 99.) Plaintiff was liable to its depositor for the amount of the check. (*Thomson v. Bank of British N. A.*, 82 N. Y. 1.)

EARL, J. This action was brought to recover of the defendant an amount of money claimed to be due from it to the plaintiff on account of the following facts: On the 9th day of March, 1870, the plaintiff had with the defendant a deposit account, upon which was due the plaintiff more than \$17,500, and on that day the plaintiff drew a check on the defendant for that sum, payable to the order of Mrs. Halpine. That check was on the same day certified to be good by the teller of the defendant. It does not appear for whom or upon whose request the certification was made. On the next day the check, with the forged indorsement of Mrs. Halpine thereon, was presented to the defendant for payment, and by it paid to some person other than Mrs. Halpine, and the amount thereof was then charged to the plaintiff in the books of the defendant.

According to the usual course of dealing between the parties, the pass-book containing the entries of the deposits made by the plaintiff with the defendant, and of the payments made by the defendant on account thereof, was written up and returned to the plaintiff every fortnight, together with the checks or other vouchers for the payment of the moneys so entered in the book as paid. On the 17th day of March, 1870, in accordance with such course of dealing, the pass-book containing the charge of the check for \$17,500, was balanced and returned to the plaintiff, together with the check as a voucher for such charge. The account between the parties has at all times since the date of the check continued and still exists. The plaintiff had no notice or knowledge that the signature of Mrs. Halpine on the back of the check was claimed to have been forged until on or about the 24th day of January, 1877, and thereafter, on the 26th day of May, it notified the defendant thereof, and still later further notified the defendant that suit had been commenced against it for the recovery of the amount of the check, upon the allegation that Mrs. Halpine's indorsement thereof had been forged. On the 20th day of June, 1877, the plaintiff demanded of the defendant the payment of the amount of the check and tendered the check to it, and it refused payment. This action was commenced on the 7th day of November, 1877.

Upon the trial the only defense relied upon by the defendant, so far as the record now before us discloses, was the statute of limitations, and that defense was overruled by the court.

We are of opinion that the plaintiff's cause of action was not barred by the statute of limitations. The defendant had no specific moneys of the plaintiff in its possession, but became a debtor to the plaintiff for all moneys deposited with it by the plaintiff. The law is settled beyond dispute that the debt on account of the moneys so deposited does not become due until demand actually made, and that a depositor has no cause of action for such debt until after actual demand.

In this case the certification did not make the check due without demand. Such a certification simply binds the drawee bank to have and hold sufficient funds to pay the check to one

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lawfully demanding payment. In other respects it still remains a depositary liable to pay only upon demand. It would be a very inconvenient rule, subversive, it is believed, of the usage and contrary to the understanding of bankers, to hold that all certified checks were due and could be sued upon without demand.

The mere drawing of the check was not a demand. By the check the plaintiff authorized Mrs. Halpine, or some person taking the check from or under her, to make the demand. Here Mrs. Halpine never made any demand of the defendant, and no person in her behalf made any demand, and the plaintiff first demanded payment on the 20th day of June, 1877.

When the defendant paid the check upon the forged indorsement, it paid its own money, and discharged no part of its indebtedness to the plaintiff. It still remained indebted to the plaintiff for the sum of \$17,500; and the plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account by the defendant. When it discovered the mistake it had the right to repudiate the charge, return the check and claim payment of the sum really unpaid to it or upon its order. The defendant was bound to see to it at its peril that the indorsement of Mrs. Halpine was genuine; that it paid the check to one entitled to the payment thereof; and that it got good title to the check as a voucher, and the loss, as between it and the plaintiff, for a wrongful payment, must fall upon it.

These views are abundantly sustained by authority. (*Weisser v. Denison, President, etc.*, 10 N. Y. 68; *Howell v. Adams*, 68 id. 314; *Welsh v. German Am. B'k*, 73 id. 424; 29 Am. Rep. 175; *Thomson v. B'k of British North Am.*, 82 N. Y. 1.)

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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to return the forged security immediately upon the discovery of the forgery, in order that the party transferring it may at once have his recourse against the party from whom he received it. (*Thomas v. Todd*, 16 Hill, 340; *B'k of the U. S. v. B'k of Georgia*, 10 Wheat. 333; *Kenny v. First Nat. B'k of Albany*, 50 Barb. 112; *Young v. Adams*, 6 Mass. 182; *Salem B'k v. Gloucester B'k*, 17 id. 33; *Simons v. Clarke*, 11 Ill. 137-141; *Bassett v. Brown*, 105 Mass. 551.) The rules laid down in relation to the payment by a debtor of an existing indebtedness in counterfeit bank bills, or other spurious paper, are applicable to cases of sales of public securities or bonds like that now before us. (*Thomas v. Todd*, 6 Hill, 340; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Kenny v. First Nat. B'k of Albany*, 50 Barb. 112; *Young v. Adams*, 6 Mass. 182; *Salem B'k v. Gloucester B'k*, 17 id. 33.) In the case of the sale of real or personal property under an implied warranty of title, the rule is well settled that the vendee may "voluntarily yield possession to a claimant, and recover against the vendor on the implied warranty of title, upon showing that the claimant had title paramount." (*Sweetman v. Prince*, 26 N. Y. 224; *Bordwell v. Collie*, 45 id. 495; *Gillmarult v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 id. 599; *Drew v. Towle*, 30 N. H. 537.) The right of a vendee purchasing goods or chattels with a warranty of quality, express or implied, to rescind the sale and return the goods, on account of a breach of the warranty, may be lost by failure of the vendee to return the goods within a reasonable time. (*Grimaldi v. White*, 4 Esp. 95; *Groning v. Mendham*, 1 Stark. 257; *Hopkins v. Appleby*, id. 477; *Milner v. Tucker*, 1 C. & P. 15; *Reed v. Randall*, 29 N. Y. 258; *Smith v. Mercer*, 6 Taunt. 76; *Cocks v. Masterton*, 9 B. & C. 908.) A waiver to be operative must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the amount. (*Ripley v. Etna Ins. Co.*, 30 N. Y. 136.) Estoppels are not favored by the law and they "must be certain to every intent, and not to be taken by argument or

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inference." (Co. Litt. 352; *Dezell v. Odell*, 3 Hill, 215.) The promise ought to be explicit, and made out by clear and unequivocal evidence. (*Miller v. Hackley*, 5 Johns. 375.)

John E. Burrill for respondents. The judgment record in the case of Budge, Shiff & Co. against the plaintiffs was binding on the defendants in respect to the question of counterfeit character. (*Heiser v. Hatch*, Ct. of Appeals.) There was no negligence or unreasonable delay in the discovery of the spurious character of the notes, nor in the communication of that fact to the defendants, nor in the offer to return the notes to them. (*Burrell v. Watertown Co.*, 51 Barb. 112-113; *Merkle v. Hatfield*, 2 Johns. 455; *Canal B'k v. B'k of Albany*, 1 Hill, 287; 2 Parsons on Notes, 601; 2 Daniel on Neg. Instruments, § 1372; *Kent v. Bornstein*, 12 Allen, 342; *Third Nat. B'k v. Allen*, 59 Mo. 310; *Jones v. Ryde*, 5 Taunt. 488; *Thomas v. Todd*, 6 Hill, 340; *Union B'k v. U. S. B'k*, 3 Mass. 74; *Canal B'k v. Bank*, 1 Hill, 293; *Fogg v. Sawyer*, 9 N. H. 367; *Raymond v. Baar*, 13 S. & R. 318; *Townsend v. Bank*, 7 Wis. 185; 2 Story on Contracts [5th ed.], § 1347; *Gloucester B'k v. Salem B'k*, 17 Mass. 32; *U. S. B'k v. Georgia B'k*, 10 Wheat. 333.) There is in all sales of money securities an implied warranty of genuineness. (*Ross v. Terry*, 63 N. Y. 613; *Murray v. Judah*, 6 Cow. 484; *Otis v. Cullum*, 92 U. S. 447; *Littauer v. Goldman*, 72 N. Y. 506; *Whitney v. Bank*, 45 id. 303; *Bell v. Dagg*, 2 T. & C. 623.) An action for breach of warranty where the contract of sale has been executed may be maintained without any return or offer to return the subject of the contract. (*Rust v. Eckler*, 41 N. Y. 488; *Foot v. Bentley*, 44 id. 156.) The fact that the defendants acted as the agents of the Indianapolis Bank in the transaction is not material. (*Canal B'k v. Bank*, 1 Hill, 293; *Howe v. Buff. Co.*, 37 N. Y. 297; 1 Wait's Actions and Defences, 272-3; *Stover v. Flack*, 41 Barb. 162; *Hale v. Andrus*, 6 Cow. 225.)

DANFORTH, J. Upon the pleadings, the questions were, whether certain written instruments purporting to be obliga-

tions of the United States, known as "seventy-thirty" notes, numbered respectively 16074, 160436, 68573, 140133, were in fact sold by the defendants to the plaintiffs, and if so, were they forgeries? At the trial evidence was given by the plaintiffs upon these points, but the defendants controverted none of it, and we agree with the two courts by whom the facts in issue have been examined, that the testimony established the identity of the notes as those sold by the defendants, and it being unanswered, that there was no question upon which the opinion of the jury was necessary. The appellants, however, claim that the plaintiffs were negligent in not sooner detecting the forgery, and also in failing to return the notes. No authority is cited to the effect that one who sells as genuine, a forged note, can avoid his liability to refund because of delay by his vendee in detecting the forgery, or in giving notice of it. The duty of the vendee to make such examination, cannot be greater than was the duty of the vendor to make it, before he parted with the paper and received its price, nor will the mere lapse of time confirm his title to the purchase-money if the purchaser exercised reasonable diligence in giving notice after the forgery was ascertained. (*Weisser v. Denison*, 10 N. Y. 68; *Bank of Commerce v. Union Bank*, 3 id. 230; *Kingston Bank v. Eltinge*, 40 id. 391; *Heiser v. Hatch*, 86 id. 614, opinion by FOLGER, J.) This was done. The notes were purchased on the 24th of September, 1867, and sold by the plaintiffs on the same day — the note No. 160-174 to Hatch, Foote & Co., the others to Budge, Shiff & Co. The first was redeemed at the treasury department, but afterwards found to be a forgery, and judgment recovered by the United States against Hatch, Foot & Co. The others had again changed owners, and on the 20th of December, 1867, the plaintiffs were notified that the coupons which became due in that month, were rejected by the government on the same ground. On that day the plaintiffs gave this information to the defendants, and demanded back the money paid. The reply was that if the plaintiffs "had to pay for those notes, or brought them evidence that they were counterfeit, they would

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pay." On the 30th of January, 1868, Budge, Shiff & Co. sued these plaintiffs for money paid by them for the three notes and they gave notice to the defendants herein of that action, and requested them to defend. They did not do so. Budge, Shiff & Co. obtained judgment in their suit March 26, 1878. After the verdict and before entry of judgment plaintiffs notified defendants of the decision against them. The plaintiffs were also sued for like cause by Hatch, Foote & Co., to recover the money paid for note No. 160174, and the plaintiffs after the entry of said judgment paid them and also the holders of the other notes. This was sufficient. The defendants were afforded an immediate opportunity either to take back the paper, or establish its value. Failing to do either, they cannot be heard to say that it was unreasonable for their vendees, to await the result of a judicial determination as to the character of the paper, before taking it back, or that having done so, they are not now entitled to the money which that determination shows was obtained from them without consideration. As we concur with the General Term upon these propositions—decisive of the case—it is unnecessary to add more.

The judgment appealed from should be affirmed.

All concur except RAPALLO, J., absent.

Judgment affirmed.

In the Matter of the Petition of WILLIAM BLODGETT and others
to Vacate an Assessment.

The provision of the charter of New York city of 1873 (§ 91, chap. 835, Laws of 1873) requiring any work undertaken for the city, involving an expenditure of over \$1,000, to be let by contract in the manner specified, was intended as a general rule governing the action of all officers and departments of the city government.

The provision of said charter (§ 73) vesting in the department of public works, created by the charter, the powers and functions previously possessed by the old department of public works and by the department of public parks did not preserve to the newly organized department the power

91	117
125	635
91	117
129	8

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formerly possessed by the department of public parks to do the work they were authorized to perform in their discretion by day's work instead of by contract.

Prior to the passage of said charter, a plan for the drainage of the "Boulevard" throughout its whole extent had been prepared and approved by the proper authorities. The sewers were divided into five sections or districts, each independent of and entirely disconnected with the others, having a different outlet and capable of being separately constructed without regard to the others. A separate assessment was made for the work in each section. When the charter was adopted some work had been done upon one of the sections. *Held*, that this was not work "in progress" upon all the sections within the meaning of the exception in said provision in regard to contracts, exempting such work from the contract system; that the sewerage of the Boulevard was not an entire work but a series of separate improvements, and that, therefore, an assessment for constructing sewers in one of the sections whereon no work had been done prior to the charter, the improvement having been done by day's work not by contract, was illegal and void.

(Argued December 12, 1882; decided January 16, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made at the October term, 1882, reversing an order of Special Term vacating an assessment.

The nature of the assessment and the material facts are stated in the opinion.

Charles E. Miller for appellants. If this work was in progress at the time of the passage of the charter of 1873, no valid objection exists to the assessment. If not, then, in the absence of a contract founded on sealed bids, the assessment is invalid. (*Matter Em. Ind. Savgs. B'k*, 75 N. Y. 388.) This was not a work in progress when the charter of 1873 was passed. (*Matter of Weil*, 83 N. Y. 542.) The board of assessors and of revision had no power to vacate or set aside the assessment because of want of power in the corporation to impose any assessment whatever. (*Matter of Lange*, 85 N. Y. 307.)

D. J. Dean for respondent. The work in question is clearly within the exception of "such works now in progress as are

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authorized by law or ordinance to be done otherwise than by contract." (*Easton v. Pickersgill*, 55 N. Y. 314; *Troup v. Haight*, Hopkins, 239-268; *People v. Dayton*, 55 N. Y.; Story on the Constitution, § 408; Cooley on Const. Lim. 67; *Union Ins. Co. v. Hoge*, 21 How. [U. S.] 65; *In re Female Academy of the Sacred Heart*, 6 Hun, 109, 113, 114; *Brown v. The Mayor*, 55 How. 9.) The work in question is one of the works which, by the provisions of the charter of 1873, are authorized to be done otherwise than in the manner provided by section 91. (*Greene v. Mayor*, 60 N. Y. 603; *Kingsley v. Mayor*, 7 Abb. N. C. 42; Laws 1866, chap. 367, § 7, p. 822; Laws of 1870, chap. 137, §§ 94-96; chap. 383, §§ 15, 16; Laws of 1872, chap. 872, § 7, p. 2134; *People v. Mayor*, 32 Barb. 35; *Ellis v. Mayor*, 1 Daly, 103; *Eaton v. Pickersgill*, 55 N. Y. 314.) The policy of the legislature, evinced by a long series of acts, in relation to the improvement of the upper part of the city, has been to allow the peculiar improvements therein directed to be effected without contract, founded upon public letting. (Laws of 1859, chap. 363; Laws of 1864, chap. 275; Laws of 1865, chaps. 564, 565; Laws of 1866, chap. 367, § 4; Laws of 1867, chap. 697; Laws of 1870, chap. 626; Laws of 1872, chap. 872.) It is the duty of the legislature to confine and modify statutory remedies against assessments, so that substantial justice shall be done to both the city and the assessed person. (*People v. Utica Ins. Co.*, 15 Johns. 358; *Jackson v. Collins*, 3 Cow. 89; *Dresser v. Brooks*, 3 Barb. 429; *In re Merriam*, 84 N. Y. 610.)

FINCH, J. This assessment was levied to pay the expense of sewerage upon the Boulevard between Seventy-seventh and Ninety-second streets, and is sought to be vacated upon the ground that the work was not done by contract as required by the charter of 1873. (Laws of 1873, chap. 335, § 91.) The application is resisted by the city upon two grounds; first, that the sewerage was a "work in progress" at the adoption of the charter, and so excepted from the contract system by the terms of that enactment; and, second, that the transfer by

section 73 to the newly-constituted department of public works of "all the powers and functions heretofore, or now possessed by the department of public works in relation to the Boulevard road or public drive, streets, avenues, and roads above Fifty-ninth street," and the direction that "all provisions of law conferring powers and devolving duties upon the department of public parks in relation thereto," should be "transferred to and conferred upon the newly-organized department," preserved the right of that department to perform its work by the day and without advertisement and contract.

First. The facts established lead us to the conclusion that the sewerage for which the assessment in question was made was not a work "in progress" within the exception of the charter. What is known as the Boulevard is the wide avenue laid out by the commissioners of the Central park pursuant to chapter 565 of the Laws of 1865, and extending from Fifty-ninth street along the general course of the old Bloomingdale road to One Hundred and Fifty-fifth street. This improvement is described as about five miles in length, constituting an avenue of unusual width; having a road-way on each side, and ornamented grounds in the center; serving as a street, and yet being something more and different, and a work peculiar in its elements of beauty and ornament; partaking of the nature of a public park or place, while constructed in the form and serving the ordinary purposes of a street or avenue. A proper drainage was an essential and necessary element of its construction. A plan for such drainage throughout its whole extent was prepared and approved by the proper authorities in March, 1872. But, as the grades of the Boulevard were different and somewhat irregular, it became impossible to adopt one complete and uniform system of sewerage covering its entire length, and it proved to be necessary to divide that work into sections, or drainage areas. Accordingly, the system of sewers for the Boulevard was divided into five sections, each designated by a letter and number, of which the section between Seventy-seventh and Ninety-second street was designated as 12 E. This division was not arbitrary, or purely as a matter of convenience. It

grew out of and was dictated by the character of the grades. Each of the five drainage areas or districts was independent of every other from the necessities of the case, and its size and boundaries were dictated by the character of the district to be drained. Each section had its separate outlet; was in no manner connected with any other; was not at all affected by what was done or undone elsewhere; and constituted an independent work by itself. One could have been completed, and accomplished its purpose perfectly and effectually, although the others were untouched, and they could have been successfully built although the one had been entirely omitted. One might have been completed by day's work, while others were progressing under contracts without the least collision or complication, or the slightest necessary waste. For the purpose of assessment this natural separation was recognized and enforced. Each section was charged with its own necessary expense, and a separate assessment for that improvement levied upon the property benefited within that particular drainage area. Each section thus paid for its own separate system of sewers, and the property-owners in one gained no benefit and suffered no loss from the greater or less expense incurred in another.

When the charter was adopted, some work had been done upon one of the sections, but none upon the drainage district for which the present assessment was levied. The section in progress was distant a half mile. It is now claimed on behalf of the city that the sewerage of the Boulevard was one entire work, and the beginning of the improvement upon any one separate section was work "in progress" upon all. We have recently considered the meaning of this phrase as used in the charter, and the scope and purpose of the exception thereby declared. (*Matter of Weil*, 83 N. Y. 543.) In that case we expressed the opinion that the purpose of the exception was to avoid the evil and complication arising from an application of the contract system to work already commenced, and moving toward completion in a different manner; and was descriptive of cases where the city was already committed to a specific mode of doing the work and could not change the system

without complication or confusion. That was a case of changing the grade of Ninth avenue, and of certain intersecting streets to correspond with such grade. The several streets were regulated separately, each as a distinct work, and followed by its own separate and distinct assessment. We thought then that while in some broad and general sense the whole work might be described as one general improvement, it was in fact for the purposes of assessment a series of separate improvements. The facts of the present case, and the argument upon them has served only to strengthen and confirm our confidence in that judgment. The exception of the charter had an evident purpose and aim. The general and dominant idea was to do all of the city's work by the contract system, and that only was intended to be exempted which was already begun, which was "in progress" on a system and in a mode of its own, and which could not be interfered with unless at the peril of evil consequences. Here it is easy to see that no sensible or real reason existed for not applying the contract system. The separate and independent work of this separate and independent drainage area, to be followed by its own separate and distinct assessment, could have been done on the contract system without any difficulty or the least collision with existing arrangements. Not one substantial reason can be imagined or given for withdrawing it from the general mandate of the charter. We conclude, therefore, that it was not within the exception, and the work should have been done by contract.

Second. We have already twice expressed the opinion that the discretion conferred before the charter of 1873 upon the commissioners of the Central park to do the work which they were authorized to perform in such manner as they should determine, whether by contract or day's work, which in 1870 was transferred to the department of public parks, was not saved by section 73 of the charter of 1873 to the newly-constituted department of public works. (*Matter of Robbins*, 82 N. Y. 131; *Matter of Weil*, *supra*.) It is claimed, however, on behalf of the city that in neither case was the question necessarily involved, and it has been argued here with so much of

earnestness as an open question as to make prudent some further consideration of the result previously declared.

Power to construct the Boulevard was originally conferred upon the commissioners of the Central park. (Laws of 1865, chap. 565.) Since at that time there was no limitation upon the manner of exercising the power, they had a discretion to proceed by day's work, or by contract, as to them seemed best (*Greene v. Mayor*, 60 N. Y. 303); and that discretion appears to have been expressly conferred by statute. (Laws of 1866, chap. 367, § 7.) We may further concede, without so deciding, that it remained to the date of the charter of 1873, so as to narrow the question to the effect of that enactment. The provisions of section 91 were intended to lay down a broad and general rule which should govern the action of all officers and departments of the city government in the performance of their duties and the exercise of their powers. It did not purport to dictate their duties nor define their powers, but *did* aim to control and take away any discretion upon one subject in the performance of duty or the exercise of power. For example, it in no respect defined or controlled the powers of the department of public works, but it did enact that such department should exercise certain of its powers only in one way, and so limited its mode of exercising them. On the other hand, the purport of section 73 was to further define the powers and duties of the newly-constituted department of public works. By section 70 its organization was provided for. By section 71 its general "cognizance and control" is described by a schedule of ten subjects to which it should extend, one of which is "public sewers and drainage." By section 72 it is divided into eight bureaux, and is followed by section 73, which still further defines and extends its powers. It authorizes the commissioner to contract for lighting the streets, and to introduce water meters and collect the charges from consumers, and then follows the language upon which the city relies. We think its point and purpose has been misapprehended. It had no special reference to the Boulevard as is contended, but to that in common with all the other streets, avenues and roads

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above Fifty-ninth street "*not* embraced within the limits of, or immediately adjacent to any park or public place." In the *Robbins Case* the whole course of legislation leading down to this provision is fully and clearly detailed, and it demonstrates conclusively that its distinct and definite purpose, when it first appeared in the act of 1872, was to draw the line between the jurisdiction of the department of public works and that of public parks, and to restore to the former and take away from the latter control of streets north of Fifty-ninth street, including the Boulevard, so far as they were "*not*" within or adjacent to the public parks. Those which were, and those only, were left to the control of the department of public parks. There is, thus, no inconsistency between section 91 and section 73. The latter helps to define the jurisdiction of the department of public works, while the former requires that whenever acting in the exercise of its powers it shall have no discretion as to the mode of doing the work, but shall proceed by contract. We have no doubt of the correctness of the construction adopted in the cases referred to, and decide again that section 73 was not intended to, and does not save to the department of public works the right to dispense with the contract system.

It follows that the assessment complained of was invalid, and should be vacated.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

SOPHIA M. SHELDON, as Administratrix, etc., Respondent, v.
WILLIAM E. HAXTUN, Appellant.

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128	407

Defendant, who resided in Illinois, having collected certain moneys belonging to S., a resident of this State, by an agreement with the latter sent to him by mail, in place of the money, his (defendant's) notes for

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the amounts, dated at his place of residence in Illinois, payable with ten per cent interest, which rate of interest was lawful in that State. In an action upon the notes wherein the defense of usury was pleaded, *held*, that their validity was to be determined by the law of Illinois, and as they were valid there they were valid here; and this although one of the notes was made payable in this State.

Defendant was formerly a resident of this State. When here he borrowed of S. \$1,500, giving his note therefor, executed here but dated at a place in Illinois, payable with ten per cent interest. After the defendant had become a resident of Illinois S. sent the note, which was then past due, to him by mail, requesting a new note for the balance of principal unpaid, this defendant sent by mail, the new note being dated in Illinois, payable one year from date, with ten per cent interest. *Held* (ANDREWS, Ch. J., and MILLER, J., dissenting), that although the original note was usurious and void, yet, in the absence of any evidence of an intent to evade the usury laws of this State, the new note was to be regarded as an Illinois contract; that the surrender of the old note was a good consideration therefor; and that it was valid.

Where a usurious contract is mutually abandoned by the parties and the securities given therefor canceled and destroyed, a subsequent promise by the borrower to pay the money actually loaned is not tainted by the original usury, is for a good consideration, and can be enforced.

(Argued October 25, 1882; decided January 28, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 15, 1881, which affirmed a judgment in favor of Jeremiah Sheldon, the original plaintiff, entered upon a verdict. After judgment was perfected on the verdict, Sheldon died, and the present plaintiff, his administratrix, was substituted. (Reported below, 24 Hun, 196.)

This action was brought upon five promissory notes, given by the defendant to said Sheldon, all dated at Kewanee, Illinois, and all made payable, with interest at the rate of ten per cent. The defense was usury. Four of the notes were given under the following circumstances: In 1870, both of the parties being then residents of this State, defendant sold to Sheldon five notes of \$500, payable with ten per cent interest, executed in Illinois by a resident thereof, secured by mortgage upon land near Kewanee, in that State. Defendant subsequently removed to

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Illinois and these notes were delivered to him for collection. He collected them as they became due, with the interest, and under an agreement with Sheldon, sent to him by mail his own notes for the amounts collected, which were the notes in question. The fifth note was given under the following circumstances: In September, 1870, before defendant moved to Illinois, but when he had it in contemplation, Sheldon loaned to him here \$1,500, taking his note therefor, dated at Kewanee, but executed in this State, payable with interest at the rate of ten per cent per annum. The interest was paid by defendant at the rate fixed up to 1876. On September 14, 1876, defendant, who was then residing at Kewanee, in Illinois, sent to plaintiff a draft on New York for \$650, to pay the year's interest, and \$500 of the principal. Plaintiff acknowledged the receipt by letter and inclosed therein the note, which was long past due, requesting defendant to send a new note, dated September 25, 1876, for the \$1,000 of principal unpaid, giving as a reason that there was no room upon the old note to make the proper indorsement. In compliance with the request defendant sent the note in question for the \$1,000, payable one year from date, with ten per cent interest.

C. B. Herrick for appellant. The evidence shows a complete contract between residents of this State for the loan of money made within this State upon a note made and delivered in this State and not to be repaid elsewhere, and it must, therefore, be governed by the laws of New York. (Story's Conflict of Laws, §§ 278a, 282; *Curtis v. Leavitt*, 15 N. Y. 88; *Jewell v. Wright*, 30 id. 264; *Cope v. Wheeler*, 41 id. 303; 53 Barb. 350; *Merchants' B'k v. Griswold*, 72 N. Y. 481; *Evans v. Anderson*, 78 Ill. 558; *Dickinson v. Edwards*, 77 N. Y. 576; *Tilden v. Blair*, 21 Wall. 241; *Richardson v. Draper*, 23 Hun, 188; *Williams v. Fitzhugh*, 37 N. Y. 444.) Usury contaminates all subsequent securities. (*Price v. Lyons B'k*, 33 N. Y. 55; *Cope v. Wheeler*, 41 id. 303; 53 Barb. 350; *De Wolf v. Johnson*, 10 Wheat. 383; *House v. Davis*, 60 Ill. 367.) The law of the place of the actual making of the con-

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tract must govern as to the validity or invalidity thereof. (*Wayne Co. v. Low*, 81 N. Y. 566; *West. Trans. C. Co. v. Kilderhouse*, 87 id. 430; *Millikin v. Pratt*, 24 Alb. L. J. 111; 125 Mass. 374; *Cook v. Litchfield*, 9 N. Y. 279; *Gray v. Ramsey*, 89 Ill. 221.) The obligations evidenced by these notes were purely personal. (*Chapman v. Robertson*, 6 Paige, 627; *Bryant v. Edson*, 8 Vt. 347; *Hyde v. Goodnow*, 3 N. Y. 266; *Lee v. Selleck*, 33 id. 615.)

Henry M. Taylor for respondent. Where the parties to a contract for the loan of money intend, in good faith, to make the contract subject to the laws of another State, to which it conforms, and under circumstances which justify that intention, and show that it was not intended as an evasion of the usury laws of this State, the courts of this State will sustain and enforce the contract, although it would be invalid if subject to the laws of this State. And this, although one or both of the parties reside in this State, provided it is so made payable here, "not as an essential part of the contract or with the intent to affix a legal consequence to the instrument." (*Chapman v. Robertson*, 6 Paige, 627; *Platt v. Adams*, 7 id. 616; *Balme v. Wamburgh*, 38 Barb. 352; *B'k of Georgia v. Lervin*, 45 id. 340; *Dickinson v. Edward*, 77 N. Y. 576; *Wayne Co. Savings B'k v. Low*, 81 id. 571; *Tilden v. Blair*, 21 Wall. 241; *Potter v. Tallman*, 35 Barb. 182; *Cutler v. Wright*, 22 N. Y. 472.) A contract is to be governed by the laws of the place where it is made, if it is not to be performed by its terms elsewhere. (*Jewell v. Wright*, 30 N. Y. 264; *Merchants' Bank v. Griswold*, 72 id. 480; *Dickinson v. Edwards*, 77 id. 576.) The fact that the money for the \$1,500 note, the original of the \$1,000, was advanced to defendant at plaintiff's residence in this State is not material. (*Potter v. Tallman*, 35 Barb. 182.)

ANDREWS, Ch. J. The defense of usury was not established as to the four notes given for money collected by the defendant on the notes and mortgage owned by the intestate. The notes

so collected and the mortgage given to secure them, were transferred by the defendant to the intestate in the spring of 1875. They were Illinois contracts, and the notes were payable with interest at the rate of ten per cent, per annum. The intestate paid to the defendant as the consideration of the transfer, the full amount of principal and interest unpaid on the securities. When this transaction took place the parties were both residents of this State. But the defendant was then contemplating removing to Illinois, and did remove there prior to the maturity of the first note. By an arrangement between the parties, the defendant collected the first note when due from Hopkins and Roberts, the makers, and retained the money so collected, and in place thereof sent by mail to the intestate in this State, his own note for a similar amount, dated Kewanee, Ill., his place of residence, payable with interest at ten per cent per annum, that being the lawful rate of interest in that State. The same arrangement was made in respect to each successive note collected by the defendant. The defendant collected from the parties in Illinois, and instead of remitting the proceeds, sent his own note for the same amount, specifying the same rate of interest as was named in the note collected. The transaction was in substance a loan by the plaintiff's intestate, a resident of New York, to the defendant, a resident of Illinois, in the latter State, of funds there held by, and belonging to, the former, at a rate of interest lawful in Illinois. If the plaintiff's intestate had gone in person to Illinois, and collected the notes, and then lent the money to the defendant at ten per cent interest, there could we apprehend be no question as to the lawfulness of the transaction, although the notes were payable in this State. (*Pratt v. Adams*, 7 Paige, 616; *RAPALLO, J., in Wayne Co. B'k v. Low*, 81 N. Y. 572; 37 Am. Rep. 533.) Nor could it we conceive alter the case if the negotiation for the loan was made in this State, and afterward consummated and the transaction completed in Illinois, the transaction being *bona fide*, and there being no intent thereby to evade the laws of this State. The dealing, for the purpose of determining the question of usury, would be assigned to the

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place where the funds were and where the loan was consummated. What occurred between the parties was equivalent to the plaintiff's intestate going to Illinois and there making the several loans to the defendant. The funds were there in possession of the defendant as agent. He was permitted to retain them, and became a debtor for the amount. Upon depositing the notes in the mail the transaction was complete. The money became the defendant's, and the notes the property of the intestate. The defendant became the borrower of the proceeds of the notes collected by him. The fact that one of the notes was expressly payable in this State does not distinguish it in the point of usury from the others. This was an incidental circumstance and does not overthrow the other decisive circumstances which make Illinois the place of contract. (*Tilden v. Blair*, 21 Wall. 241; *Wayne Co. B'k v. Low*, *supra*.) For these reasons we are of opinion that the defense failed, as to the four notes referred to.

The defense as to the note of September 21, 1876, for \$1,000, being the fifth cause of action set forth in the complaint, is founded upon a different transaction, and as to this note we think the fact of usury was established. The note of September 21, 1870, for \$1,500 was made and delivered in this State upon a loan of that amount made here at the time by the plaintiff's intestate to the defendant, both parties being then resident here. This was plainly a New York contract, and its validity is governed by the law of this State, and as such it was plainly usurious. The delivery of the note at Kewanee, Ill., did not make that the place of the contract, nor is it material that the borrower was about to remove to that State, or intended to use the money there. (*Cope v. Wheeler*, 41 N. Y. 303.) The sole consideration of the note of September 21, 1876, was the balance then unpaid on the note of September 21, 1870. It was given at the request of the plaintiff's intestate, because there was no room for more indorsements of payments on the original note. The surrender of the old note and the extension of time was ample consideration for the new note, but the substituted security was tainted with the vice of the original

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transaction. We need not consider how the courts of Illinois would deal with the question if the suit had been brought in that State. The fact that the original loan was at a rate of interest lawful in that State, does not make the contract lawful here, nor does the fact that the new note was made in that State and prescribed a rate of interest lawful there, take it out of the operation of the well-settled doctrine that a new security for a usurious debt is affected by the usury in the original transaction. (*Tuthill v. Davis*, 20 J. R. 256; *Reed v. Smith*, 9 Cow. 648.)

But the majority of my brethren are of opinion, for the reasons stated in the opinion of EARL, J., that the note of September 21, 1876, is to be treated as an Illinois contract, and is not usurious.

The judgment of the General Term should therefore be affirmed, with costs.

EARL, J. I concur fully with the chief judge as to the four notes mentioned in the first four counts of the complaint, but I differ with him as to his conclusion in reference to the note for \$1,000, mentioned in the fifth count of the complaint, and I will briefly state the grounds for my difference:

For precisely the same reasons stated by the chief judge for holding that the four notes must be regarded as Illinois contracts, this note must be so regarded. I agree that the original note for \$1,500 was a New York contract, and, therefore, usurious and void. After that note had been long past due, and numerous payments had been made thereon, on the 14th day of September, 1876, the defendant, who was then a resident of the State of Illinois, sent to the plaintiff, who was a resident of this State, a draft on New York for \$650, being the interest at the rate of ten per cent on the note, and \$500 to be applied upon the principal. On the 25th of September the plaintiff acknowledged the receipt of the draft in a letter which he wrote to the defendant addressed to him at his place of residence, in which he inclosed the note for \$1,500, saying that there was no room to make the proper indorsements thereon, and requesting

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him to send a note dated September 25, 1876, for the \$1,000 of principal remaining due to him upon the note. In pursuance of that request the defendant executed the note for \$1,000, payable in one year from date, with interest at ten per cent. The note was executed in Illinois at the place of defendant's residence, and expressed no place of payment, and was forwarded to the plaintiff in this State by mail. There was no evidence tending to show that there was any intention on the part of either of the parties to evade the usury laws of this State, and the note was manifestly executed with reference to the laws of the State of Illinois, where the maker resided, and where the laws authorized the rate of interest inserted in the note. The note was given in Illinois in exchange for a note there surrendered through the agency of the mail by the plaintiff to the defendant; and when in pursuance of plaintiff's request this note was executed by the defendant and put in the mail, directed to him at his residence in this State, the contract between the parties was complete, and the note then became the property of the plaintiff. If it had been lost in the mails it would have been lost as the property of the plaintiff, and he could thereafter have sued the defendant thereon as upon a lost note. If it had been stolen from the mails, or unlawfully taken or converted, it could have been described in an indictment for the crime as the property of the plaintiff, or could have been recovered by him in an action of replevin, or sued for in an action of trover, claiming it as his property. This must, therefore, be treated as if the parties had met in the State of Illinois, and the plaintiff had there surrendered to the defendant the note for \$1,500, and taken from him this note for \$1,000 for the balance due upon the prior note; and from these views I do not understand the chief judge to differ.

If this note for \$1,000 had been given in this State, even with the lawful rate of interest mentioned therein, in renewal of or in substitution for the prior usurious note, it would also have been tainted with usury and void. A substituted or renewal note thus given is held void for one or both of these reasons: The new note in such a case is given in renewal or

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continuance of the usurious contract, and is, therefore, void for the same reason that condemns that contract; or it is a new security for a usurious debt or contract and void on that account. In either case the new note is void because it comes under the condemnation of the policy and the letter of our usury laws. But a usurious contract can be purged of the taint of usury and money loaned upon a usurious contract can furnish a valid consideration for a promise to pay the money actually loaned. If the usurious contract be mutually abandoned by the parties and the securities be canceled or destroyed so that they can never be made the foundation of an action, and the borrower subsequently makes a contract to pay the amount actually received by him, this last contract will not be tainted by the original usury and can be enforced. (*Hammond v. Hopping*, 13 Wend. 505; *Kilbourn v. Bradley*, 3 Day, 356; *Houser v. The Planters' B'k*, 57 Ga. 95; *B'k of Monroe v. Strong*, Clark's Ch. R. 76.)

The note for \$1,500 when it reached the State of Illinois was not a note condemned by any law of that State. It was not there illegal or tainted with usury, for the reason that the laws of New York were not operative there. It was simply subject to the defense on the part of the defendant of being unlawful because made in violation of the laws of the State of New York, where it was executed. It was a note void, not by the laws of the State of Illinois, but void under the laws of the State of New York. It had no other infirmity in the State of Illinois than that the defendant could defeat a recovery upon it if sued thereon anywhere, for the reason that it was void at the place where it was given. If he had paid on the note in Illinois a rate of interest illegal under the laws of the State of New York, such interest could not, by virtue of the usury laws of this State, have been recovered back in Illinois, or in this State; and neither could the plaintiff, under the laws of this State, be indicted for taking the usury there. It seems to me then that the only inquiry is whether the balance due upon the note for \$1,500 and the surrender of that note furnished a valid and legal consideration for the note of \$1,000; and that it did is too clear for reasonable dispute.

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A valid promise to pay money loaned upon a usurious contract which in some lawful way has been purged of its usury is always founded upon a sufficient consideration. In *Hammond v. Hopping* it was said that such a promise "is founded upon an equitable and moral obligation, which is sufficient to support an express promise. The money actually lent, when legally separated from the usurious premium, is a debt in equity and conscience, and ought to be repaid. This is the settled doctrine of a court of equity, for there the borrower will not be relieved from an usurious contract, except upon the condition of refunding the money lent, with legal interest."

Here then was a note legal by the laws of the State in which it was executed, and founded upon a sufficient consideration, and it is difficult to perceive upon what principle it can be held to be void. It was given for the balance of principal actually due upon the prior note which in the State of Illinois was simply void but not illegal; which there a party could voluntarily pay, and, as I claim, could voluntarily renew. And if this note was valid in the State of Illinois where it was given, then under principles of law universally applied it is valid here, and everywhere. The case of *Jacks v. Nichols* (5 Barb. 38) is a case precisely in point. It was there held that a new note given in the State of Connecticut at a rate of interest lawful there in the place of, and upon the surrender of a prior note made in the State of New York and there void for usury, was freed from the taint of usury. It is tersely and well said in the opinion of the court in that case "now instead of purging the contract of the excess of interest at the place where it was made (the only occasion for which is the presence of the statute of usury) the parties transfer the scene of their negotiations to another State, where any contract respecting the use of money is valid which does not violate the principles of natural justice, and there cancel the securities taken upon the original agreement, and make a new one upon the subject of the original loan, reaffirming it, and binding the borrower to pay, after a season of forbearance, which forbearance forms a part of the consideration of the new agreement; how can it be

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said that this contract is tainted with usury? The taint of usury is not recognized by the law of the place where it is made. There a party may agree to pay what he pleases, either for the past, or present use of money; and hence it appears to us that the new contract would be valid. Viewed as an agreement made in a State whose laws are silent on the subject of usury, it must be considered as much divested of the taint of usury as if it had been expressly purged of it, by the agreement of the parties made at the place of the original loan."

That case was appealed to the Court of Appeals and there the judgment was reversed (5 N. Y. 173), but solely upon the ground that the court, differing from the Supreme Court, found that the new security was a New York contract, and not a Connecticut contract, and it is a just inference from the decision that the court agreed with the Supreme Court in its law, and simply differed from it as to the facts.

In *De Wolf v. Johnson* (10 Wheat. 368), a case quite in point, JOHNSON, J., writing in a case where a new security had been given in the State of Kentucky at a rate of interest legal there, in substitution for a security given in the State of Rhode Island, which was claimed to be usurious there, said: "It is not very easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract. The defense would not admit of a moment's reflection if it rested on the direct effect which laws against usury have upon contracts. Whatever sums may have been derived through the usurious contract of 1815 (the Rhode Island contract), to the contract of 1817 (the Kentucky contract), they would not affect the latter with usury, unless introduced in violation or evasion of the laws of Kentucky, for the two contracts are governed by laws that have no connection;" that "it is clear that the Kentucky contract must be considered as a new and substantive contract. It is governed by a distinct code of laws from the Rhode Island contract, and cannot be affected by the taint of usury which might have been transmitted to it under some circumstances, had it taken place in Rhode Island. It was, then, equivalent to a payment and reloan, and no one can doubt that money

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paid on an usurious contract is not recoverable back beyond the amount of the usury paid." To the same effect is the case of *Houser v. Planters' Bank* (*supra*).

I am, therefore, of the opinion that the plaintiff was entitled to recover upon the note for \$1,000 as upon an Illinois contract, and that the entire judgment should be affirmed, with costs.

MILLER, J. (dissenting.) It is claimed that the note for \$1,500 for the balance unpaid, upon which a new note was given in Illinois, was not usurious, because it comes within the principle that a usurious contract can be purged of the taint of usury and the money loaned upon a usurious contract can furnish a valid consideration for a promise to pay the money actually loaned. There is no doubt of the correctness of this rule, and the question here is whether any such case is established within the authorities which are cited to sustain it (*Jacks v. Nichols*, 5 Barb. 38; *Houser v. The Planters' Bank*, 57 Ga. 95; *De Wolf v. Johnson*, 10 Wheat. 368), and which it is claimed are specially applicable to the facts here presented.

In *Jacks v. Nichols* (*supra*), it appears that the contract for the new loan, which was made after the first usurious contract had been entered into and carried out, was made in the State of Connecticut between the parties to the same; that the Messrs. Jacks applied to the defendant in that State and asked him to surrender the securities which had been delivered to him upon the renewal of the original loan, and to receive, instead, the five new notes which had previously been agreed upon. The defendant agreed to do so, and did surrender the securities which he then held and received new ones, and gave further time for payment. Some of the makers resided in New York, one of them in New Orleans. One of the notes was dated in the latter place. It will thus be seen that here was a contract made by parties who were out of the State at the time, and a surrender of old obligations by a previous agreement. The entire arrangement was within the State of

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Connecticut, and in this respect the case differs from the one at bar.

In *De Wolf v. Johnson* (*supra*), the original contract, which was usurious, was made in the State of Rhode Island, and by the laws of that State was usurious. The subsequent contract, in which a mortgage was given, was executed in Kentucky, and had its inception from an intimation of the borrower of a design to avail himself of the plea of usury. Upon this the plaintiff repaired to Kentucky, instituted new negotiation with the obligee, having for its object to clear the contract from all usurious incidents and to take securities for the sum loaned at the legal interest in Kentucky, which, as well as in Rhode Island, was six per cent. Accordingly, all the instruments in writing which appertained to the old contract were surrendered and a new mortgage given to secure the balance, the original sum having been reduced by large actual payments. It will be noticed that here was a new agreement, entered into for the very purpose of purging the original contract from the taint of usury, which was not usurious by the laws of the State in which it was entered into.

In *Houser v. Planters' Bank* (*supra*), the notes in suit were given in renewal of two notes previously given for which a usurious rate of interest was paid. Subsequently the usury laws were abolished. The court held that as the consideration was not wholly illegal, but void in part and good in part, and severable, the usurious part should be purged out, and that under the Code, which provides that if the consideration be good in part and void in part, and be severable, it may be sustained for the good part; and also held, that the promise was not illegal, because there was no law against usury at the time. This case does not affect the question whether a new contract, originally usurious, may be purged of the usury by a subsequent agreement.

As no authority exists which holds that the note in question was, under the circumstances, purged of the usury, I concur with the opinion of ANDREWS, Ch. J.

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RAPALLO, DANFORTH and FINCH, JJ., concur with EARL, J., as to the \$1,000 note; ANDREWS, Ch. J., and MILLER, J., dissent. All concur as to the other notes.

Judgment affirmed.

JOHN REHBERG, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Where a municipal corporation omits to act with reasonable diligence after notice of an unlawful obstruction in a street which might occasion injury to persons lawfully thereon, it is no defense to an action for injuries so occasioned that it was not known to the corporation that the obstruction was in fact dangerous.

In an action to recover damages for injuries sustained by plaintiff in consequence of the falling upon him of a pile of brick in one of defendant's streets, it appeared that the bricks were placed in the street without the permission of the city authorities by a contractor engaged in tearing down a building adjoining the street. The pile was constructed in a dangerous manner, without proper braces and was built to an improper height. The pile was commenced a week before the accident and had reached the safety limit as to height four or five days before. The charter of the city (§ 17, sub. 4, chap. 335, Laws of 1873) authorizes the common council to enact laws preventing obstructions to streets, and prohibits obstructions except "the temporary occupation thereof during the erection or repair of a building on a lot opposite the same." The police force of the city are also charged by statute with the duty at all times to remove nuisances existing in the public streets. (§ 29, chap. 403, Laws of 1864.) By a city ordinance the incumbering or obstructing a street without the consent of the mayor or street commissioners is prohibited. A policeman assigned to duty in the precinct saw the pile from time to time as it was going up, but it did not appear that he interfered or sought to ascertain whether any permit had been granted, or that he notified any officer or department of the city government of its existence. Plaintiff offered to prove that regulations had been made prescribing the height to which brick might be piled in the streets, under the permission of the proper bureau; this was rejected and plaintiff was nonsuited. *Held* error; that it was to be assumed that regulations had been made, as plaintiff offered to prove, and that the policeman assigned to duty at the place knew of them; that while the policeman might have been justified in supposing that the contractors had a permit, he ought to have known, when the pile exceeded

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the height which safety permitted, they were not acting within the scope of any authority; that notice to the policeman of the unlawful character of the obstruction was notice to the city and it is chargeable with any neglect on his part; that as to whether there was time for the city, using reasonable diligence, to have removed the obstruction after such notice and before the injury, was a question of fact for the jury.

(Argued November 13, 1882; decided January 23, 1883.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 6, 1881, which affirmed a judgment in favor of the defendant, entered upon an order nonsuiting plaintiff on trial.

This action was brought to recover damages for injuries received by plaintiff caused by the falling upon him of a pile of bricks which had been placed in a street of the city by contractors engaged in taking down a building upon a lot adjoining the street.

The material facts are stated in the opinion.

George N. Sanders for appellant. All facts are to be presumed most favorable to plaintiff. (*Clemence v. City of Auburn*, 6 N. Y. 334, 338; *Cook v. N. Y. C. R. R.*, 1 Abb. Ct. of App. Dec. 432, 433; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 74; *Stackus v. Same*, id. 466; *Stillman v. Lewis*, 49 id. 385; *Thurber v. H. B. M. & F. R. R. Co.*, 60 id. 326, 331; *Schofield v. Hermandes*, 47 id. 316; *Colt v. Sixth Ave. R. R. Co.*, 49 id. 671.) The brick pile was patently dangerous, and the city chargeable with actual notice through the police, and also with constructive notice. (*Hume v. The Mayor*, 71 N. Y. 264, 269, 275; *Reinhart v. Mayor of New York*, 2 Daly, 243, 251; *Weed v. Village of Ballston Spa*, 76 N. Y. 329, 336; *Todd v. City of Troy*, 61 id. 506, 507; *McDermott v. City of Kingston*, 6 Abb. N. C. 246; *Howe v. City of Lowell*, 101 Mass. 199; *Donaldson v. Boston*, 16 Gray, 508-9-11; *S. C.*, 82 Mass. 508, 509, 511; *Thurber v. H. B. M. & T. R. R. Co.*, 60 N. Y. 323-331; *Bills v. N. Y. C. R. R. Co.*, 84 id. 5, 10; *Willis v. L.*

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I. R. R. Co., 34 id. 679.) The city is liable for injuries from public nuisance, negligently permitted. (2 Dillon on Mun. Corp. [3d ed.], § 730, p. 722, note 1; 12 Ind. 515; Laws of 1873, chap. 335, § 17, subd. 4; *Hume v. Mayor*, 74 N. Y. 270; *Drake v. City of Lowell*, 13 Metc. 292; *Norriston v. Moyer*, 67 Penn. St. 355, 366, 367; *Willy v. Mulledy*, 78 N. Y. 310-314; *Irvine v. Wood*, 51 id. 224, 228; *Clifford v. Dam*, 81 id. 56; *Congreve v. Smith*, 18 id. 82; *City of Rochester v. Montgomery*, 72 id. 66, 67, 68, 69; *Ring v. City of Cohoes*, 77 id. 83-89; 85 id. 627.) The excluded regulations of the proper city department as to height, etc., of the piles of brick, were relevant. (1 Special and Local Laws N. Y. City, pp. 281-2, §§ 70, 72, subd. 8; *Wood v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 195-201.)

Samuel Hand for respondent. It is not enough to take the case to the jury that there be evidence therein which, considered by itself, and without reference to the other testimony in the case, might be sufficient to authorize the inference of negligence on the part of the defendant. (*Somer v. Meeker*, 25 N. Y. 361; *Deyo v. N. Y. C. & H. R. R. Co.*, 34 id. 9; *Rudd v. Davis*, 7 Hill, 529; *Davis v. Third Ave. R. R. Co.*, 41 N. Y. Sup. Ct. 35; *Wilds v. H. R. R. Co.*, 24 N. Y. 433; *Toomey v. Ry. Co.*, 91 Eng. Com. Law Rep. 148.) If all the evidence taken together is equally consistent with the conclusion that the accident was occasioned by the neglect of the defendant, as with the conclusion that the accident was occasioned by the act of a third party, without neglect of duty on the part of the defendant, then it was proper to dismiss the complaint. (*Cotton v. Wood*, 98 Eng. Com. Law Rep. 566; Wharton on Negligence, § 238; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Hart v. H. R. B. Co.*, 84 id. 57; *Riceman v. Havemeyer*, id. 647; *Reynolds v. N. Y. C. R. R. Co.*, 58 id. 248.) The piling of bricks in the street for building purposes is a lawful and necessary use of the street. (Laws of 1873, subd. 4, § 17, chap. 335; Dillon on Municipal Corporations, §§ 581, 585; *People v. Cunningham*, 1 Denie, 524; 1 Thompson on Negligence, 353.) To entitle plaintiff to

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submit his case to the jury the proof must authorize the jury to find that the pile of bricks in question was so insecurely constructed that it fell by reason of such unsafe construction, and that the defendant had either express or constructive notice of the unsafe condition of the pile. (*Masterton v. Mt. Vernon*, 58 N. Y. 394; *Smith v. The Mayor*, 66 id. 295; *McCarthy v. Syracuse*, 46 id. 197; *Hume v. The Mayor*, 47 id. 646; *Mayor v. Sheffield*, 4 Wall. 189; *Colby v. Westbrook*, 57 Me. 181; *Hart v. Brooklyn*, 36 Barb. 226; *Griffin v. The Mayor*, 5 Seld. 546; *Donlon v. Clinton*, 33 Iowa, 397; *Garrison v. New York*, 5 Bosw. 497; Dillon on Municipal Corporations, § 797; 2 Thompson on Negligence, 762.) The brick pile having been safely and lawfully constructed in the street, the defendants were not bound to anticipate and guard against the acts of third parties which might render it unsafe. (*Parker v. Cohoes*, 10 Hun, 534; 74 N. Y. 610; *Gorham v. Cooperstown*, 59 id. 660; *Dougherty v. Waltham*, 4 Gray, 596.) Hence, even if the brick pile was defectively constructed, the testimony is not sufficient to charge the defendant with notice of its unsafe condition. (*Hart v. City of Brooklyn*, 36 Barb. 229; *Gorham v. Cooperstown*, 59 N. Y. 660; *Dorlan v. City of Brooklyn*, 46 Barb. 604; Dillon on Mun. Corp., § 1006 [3d ed.], p. 1019; 74 N. Y. 268.) The pile of bricks had not been completed long enough for notice of its condition, if it was dangerous, to be implied against the defendant, or to fix upon it the duty of observing its condition and causing it to be made safe. (Laws of 1873, chap. 335, subd. 6, 8, § 72, p. 503; *Birdsall v. Russell*, 29 N. Y. 220, 249; *Scheibel v. Fairbairn*, 1 Bos. & Pul. 288; *Tindall v. Brown*, 1 Term R. 167; *Furman v. Haskin*, 2 Caines, 368, 371; *Sice v. Cunningham*, 1 Cow. 397, 408; *Vreeland v. Hyde*, 2 Hall, 429, 431; *Mohawk B'k v. Broderick*, 10 Wend. 304; *Van Trot v. McCulloch*, 2 Hilt. 272; *Herrick v. Woolverton*, 41 N. Y. 581; *Tilt v. LaSalle S. Manuf. Co.*, 5 Daly, 19; *Holbrook v. Burt*, 22 Pick. 546, 555; *Pratt v. Farrar*, 10 Allen, 519, 521; *Bassett v. Brown*, 105 Mass. 551, 567; *Haskell v. Varinka*, 111 id. 84, 85; *Williams v. Powell*, 101 id. 417,

469; *Masterton v. Mt. Vernon*, 58 N. Y. 391.) The nature of the accident and the appearance of the pile, as sworn to by the policeman whose duty it was to observe the same, is such as to establish conclusively that any defect in the construction of the pile was revealed only at the time when the accident happened. (*Smith v. Mayor*, 66 N. Y. 275; *McCarthy v. Syracuse*, 46 id. 194.) The care required of a municipal corporation with reference to obstructions placed by others in streets, is and should be much less in degree than would be exacted of a person or corporation who had constructed or maintained ways, tracks, streets or other structures for his or its own benefit, and with a view to its own pecuniary advantage or profit. (*Hill v. City of Boston*, 122 Mass. 344, 351, 360; *Bartlett v. Crozier*, 17 Johns. 430.)

ANDREWS, Ch. J. We are of opinion that this case should have been submitted to the jury. It is well settled that in determining the correctness of a nonsuit, the plaintiff is entitled to the most favorable inferences deducible from the evidence, and all contested facts are to be deemed established in his favor. The pile of bricks, the falling of which caused the injury of which the plaintiff complains, was an unlawful structure. It was not only placed in the street by private persons, without the permission of the city authorities in direct violation of the city ordinance, but it was constructed in a dangerous manner, with insufficient walls, without proper bracing, and of improper height. The walls were formed by two tiers of brick, and the pile was liable to fall from the outward pressure of the loose brick, which were thrown into and filled the hollow space within the walls. Braces were placed at intervals in the walls, but they did not lap, and were not fastened at the corners as was usual and proper. The pile was made by contractors engaged in taking down a building adjoining the street. It was composed of bricks taken from the old building, and was from thirteen to fifteen feet high. The plaintiff proved by builders that old bricks, with more or less mortar clinging to them, like those composing the pile in question, could not be safely piled

higher than eight or nine feet. The plaintiff at the time of the injury, was engaged in making an excavation in the street, for the foundation of one of the piers for the elevated railway. It was claimed on the trial that the falling of the bricks was caused by the undermining of the pile by this excavation. The evidence of the defendant upon this subject was controverted, and it must be assumed that this was not the cause of the accident. The accident occurred on Monday, May 5, 1879, between eleven and twelve o'clock in the forenoon. The pile was completed May 3d. It was commenced on or before Monday, April 29th, and the evidence would have warranted the finding that it had reached the safety limit as to height, as this limit was fixed by the plaintiff's witnesses, as early as Wednesday or Thursday previous to the accident. It was shown by a policeman who was assigned to duty in the precinct, that he saw the pile from time to time while it was going up, "but took no particular notice of it." It does not appear that he interfered to prevent its erection, or sought to ascertain whether any permit had been granted to the persons building it, or that he notified any officer or department of the city government of its existence. The plaintiff proved by the superintendent of incumbrances that he had supervision of permits issued by the city for piling bricks or other building material in the city streets, but the court excluded the plaintiff's offer to show by him that there was a uniform regulation prescribing the height of piles of brick allowed to be constructed. The court also struck out under exception, the testimony of a witness who saw the pile of bricks, that it appeared unsafe, but permitted him to state in detail the special indications of danger.

The liability of municipal corporations for injuries sustained by persons lawfully using the public streets, in consequence of defects or obstructions therein, springs from the duty imposed upon them by law to keep them in repair, and in a safe condition for use. But this duty is relative and not absolute. Where the defect or obstruction which has caused the injury was created or placed therein by the unlawful and unauthorized act of

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persons not officers of the city, the duty of the city to repair the defect or remove the obstruction, only arises after actual notice of its existence, or after such a lapse of time as would justify the imputation of negligence, if the defect or obstruction had not been discovered, and what is such reasonable time, is a question for the jury. (*Hume v. The Mayor*, 47 N. Y. 640; *S. C.*, 74 id. 264; *Reed v. Northfield*, 13 Pick. 94; 2 Dillon on Mun. Corp., § 1026.) The charter of the city of New York (Laws 1873, chap. 335, § 17, subd. 4) authorizes the common council to enact ordinances to prevent encroachments upon, or obstructions to the streets, and prohibits the common council from permitting any encroachments upon, or obstruction of the streets, except "the temporary occupation thereof during the erection or repair of a building on a lot opposite the same." The charter also creates a bureau of incumbrances, within the department of public works, and a chief officer thereof, to whom all complaints of incumbrances in the streets are to be made, and who is authorized to remove them (§ 72, subd. 8). The police force of the city are also charged by statute with the duty at all times to remove nuisances existing in the public streets, and enforce ordinances relating to police, public health or criminal procedure (Laws of 1864, chap. 403, § 29). Section 29 of the statute referred to, is embraced in the rules for the government of the police, and the attention of the members of the force is particularly directed to it. By one of the city ordinances, the incumbering or obstructing any street, wharf or pier, by any person with any article or thing whatever, without the consent of the mayor, or street commissioners, is prohibited under a penalty. It will be seen that the law recognizes that the use of the streets of the city for the placing therein of building materials, may be lawful; but the subject is placed under the regulation and control of the common council, and it must be assumed, in view of the evidence offered by the plaintiff and rejected, that regulations had been made prescribing the construction and height to which brick might be piled in the streets, under the permission of the proper bureau having

charge of that subject. Presumably, therefore, also the policeman assigned to duty where the pile of bricks was placed, understood the regulations under which such permits were granted. For, on the contrary presumption, the city might reasonably be charged with negligence in not informing policemen charged with the duty of protecting the streets against unlawful obstructions, of the regulations prescribed by the proper authority. It is also a reasonable inference that the regulations upon this subject, prohibited a construction of the character of the one in question, which was dangerous in fact and which exceeded in respect to height the limit of safety, as shown by the evidence on the part of the plaintiff. If the policeman might have been justified in supposing in the first instance that the contractors in placing the bricks in the street, were acting under a permit from the bureau of incumbrances, he must have known, or ought to have known when it exceeded the limit which safety permitted, that they were not acting within the scope of any authority conferred upon them. Notice to the policeman of this unlawful obstruction was, we think, notice to the city, and the city is chargeable with any neglect on his part to make proper observation or inquiry, or for any negligence in permitting the obstruction to exist. Whether in view of the distribution of municipal powers, or the methods of municipal business, and the time which would be required by the city after notice to cause the obstruction to be removed, the city acted with reasonable diligence after notice to the policeman of its existence, and whether there was time after such notice, to have removed the obstruction before the happening of the accident, was a question of fact for the jury, to be determined upon all the circumstances of the case. The question presented is not free from difficulty, but we are of opinion that the case ought to have been submitted to the jury upon the question of negligence on the part of the defendant. If the city omitted to act with reasonable diligence after notice of an unlawful obstruction in the street, which might occasion injury to persons lawfully therein, we think it would be no defense that it may not have known that the obstruction was

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in fact dangerous. The duty rested upon the city to remove the incumbrance; and if the incumbrance was dangerous in fact and resulted in injury to the plaintiff, the city is, we think, responsible, although it had not by actual examination and inspection ascertained its dangerous character. (*Norristown v. Moyer*, 67 Penn. St. 355; *Donaldson v. City of Boston*, 82 Mass. 508.)

The judgment should be reversed and a new trial granted.

All concur, except RAPALLO, J., absent.

Judgment reversed.

PAYN BIGELOW, Appellant, v. GEORGE HALL, Respondent.

It seems that a witness may, for the purpose of refreshing his recollection, use any memorandum made at the time of a transaction as to which he is called upon to testify, whether it was made by himself or another; the memorandum itself, however, is not evidence.

Where, however, a memorandum is made by the parties to a transaction jointly, a portion having been written by one and a portion by the other, it, being part of the *res gesta*, is admissible as evidence.

(Argued December 16, 1882; decided January 23, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Tuesday of June, 1881, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage. The defense was usury. The facts material to the question discussed are stated in the opinion.

Charles B. Sedgwick for appellant. A witness cannot be permitted to read a memorandum in evidence unless it appears that he was unable with the aid of the memorandum to speak from memory as to the facts. (*Russell v. H. R. R. Co.*, 17

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N. Y. 134, 139-40; *Halsey v. Sinsebaugh*, 15 id. 485; *Gray v. Mead*, 22 id. 462, 466; *Peck v. Martin*, 15 Hun, 470; *Wilde v. Hexter*, 50 Barb. 448; *McCormick v. Penn. R. R. Co.*, 49 N. Y. 303, 315; *Howard v. McDonough*, 77 id. 592; 29 Barb. 186; 6 Duer, 437; *Thurman v. Mosher*, 1 Hun, 344; *Gulchrist v. Brooklyn*, 59 N. Y. 498.)

John C. Hunt for respondents. The ruling made by the court, that if the witness made the memorandum and can't recollect the items without reference to the paper, he can read the paper, is correct. (*Halsey v. Sinsebaugh*, 15 N. Y. 488, 489; *Guy v. Mead*, 22 id. 462; *Marchy v. Schults*, 29 id. 346; *McCormick v. Penn. R. R. Co.*, 47 id. 315; *Wilson v. Knapp*, 70 id. 597; *Howard v. McDonald*, 77 id. 592, 593.)

MILLER, J. Upon the trial of this action the defendant Hall was called as a witness and examined in his own behalf, and testified among other things that the consideration of the mortgage consisted of various items, and to these was added a bouns of \$150, which with the other items constituted the amount of the mortgage. This bonus, it was stated, was the usurious consideration. He also testified that there was a memorandum of the items, made at the time and place of the transaction, some of the figures of which were in his handwriting and others in the handwriting of the plaintiff, which memorandum was produced, delivered to the witness and identified by him. The following proceedings took place in regard to it: The counsel for the plaintiff said, "I object to that paper." The court held that it was not evidence of itself, but the witness could use it, however. The counsel for the plaintiff said, "He can use it to refresh his recollection, I suppose." The defendant's counsel then put the following question, "State how the \$3,000 was made up?" The witness answered, "Here is a cash item of ——." Counsel for the plaintiff objected to his reading that paper and the witness said, "I merely do it to refresh my memory, to get at the items." Counsel for the plaintiff then said, "You must swear

to it independent of the paper." The judge held, "If he made the memorandum and can't recollect the items without reference to the paper, he can read the paper." To this ruling and decision the plaintiff's counsel excepted. The witness then read the items from the paper.

It will be noticed that the judge did not hold distinctly that he could read the paper in evidence, but, construing what he said literally, it will bear the interpretation in connection with what previously transpired and particularly what was said by the witness, that he might read it himself to refresh his memory, to get at the items. The rule is no doubt well settled in this State that a witness for the purpose of refreshing his memory may use any memorandum made at the time of a transaction in regard to which he is called upon to testify, whether made by himself or another, and when his memory has been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. Within this rule it is not apparent that the judge erred in holding that the witness could read the items from the memorandum for the purpose of refreshing his memory; he did not say he could read it in evidence, nor was the memorandum introduced in evidence of itself, the items only were read and there is no statement in the case that any thing more was done. It is true it was stated in the case, the witness reads the items; stating them, but it nowhere appears that the paper itself was introduced as an independent piece of testimony.

Under these circumstances and regarding what would ordinarily be considered as part of the proceedings of the trial it is not clear that the memorandum itself was introduced in evidence, and if it was not, no error was committed by the judge in his rulings. It may also be observed that if the evidence of the witness went beyond the ruling of the judge, that he might read the items, and in this form the memorandum became evidence by such reading and a part of his testimony, instead of his swearing to the facts within his own knowledge, after his memory had been refreshed, such evidence was not objected to by the defendant's counsel. It is, at least, very

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questionable as the case stands, whether the distinct point was made as to the introduction of the memorandum as evidence. Be that as it may, however, the memorandum was made, according to the testimony of the defendant, at the office of the plaintiff at the time of the transaction and in the presence of both the parties, and the figures were put on at the time, part of them in the handwriting of the defendant, and part in the handwriting of the plaintiff.

The plaintiff swears that some of the figures are in his handwriting, but whether they were made at the time he does not know. Taking this testimony as it stands there was evidence to show that the memorandum thus made constituted a part of the *res gestæ* and hence, as the act of both parties in connection with the transaction, it was admissible on that ground.

There being no error the judgment should be affirmed.

All concur.

Judgment affirmed.

EDWARD MAHADY, Respondent, v. THE BUSHWICK RAILROAD COMPANY, Appellant.

It seems that although the fee of a city street is in the city, an abutting owner is entitled to use it; and neither the legislature nor the city can devote it to purposes inconsistent with street purposes without compensation to such owner.

A horse railroad constructed under legislative authority on the surface of the street is not an unlawful interference with the rights of the abutting owner, but is a street use consistent with such rights.

An unreasonable use of the street, however, by the railroad company, such as using a switch or siding thereon for the storing and deposit of its cars to the injury of an adjoining owner, gives a right of action to the latter for the special injury.

Plaintiff's complaint alleged in substance, that defendant without lawful authority constructed a siding upon a street in the city of B. opposite plaintiff's premises; he claimed special damage caused by the occupation of the siding as a stand for its cars, cutting off access to plaintiff's lots, etc., and an injunction was asked restraining defendant from the use of the

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siding for its cars. The court impaneled a jury to assess the damages, reserving the question of law. The jury were instructed that in assessing the damages they were to assume that the siding was constructed without lawful right, and to take into consideration the annoyance plaintiff and his family had suffered. This was duly excepted to on the ground that the road was authorized by the common council of the city. The court subsequently directed judgment for the damages assessed and for an injunction restraining the use of the siding as a stand for cars, having decided against the plaintiff on the issue as to the lawfulness of the siding, and basing its decision on the ground of unreasonable use. *Held*, that the charge was erroneous, as plaintiff was only entitled to the special damages caused by the improper use of the siding; and that defendant was entitled to a new trial.

(Submitted November 21, 1882 ; decided January 23, 1883.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made July 14, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, and affirmed an order denying a motion for a new trial.

This action was brought to restrain defendant from the use of a siding or turnout for its cars on Bergen street in the city of Brooklyn and for damages.

Defendant claimed a right to the use of the street for track and sidings as lessee of the South Brooklyn Railroad Co., which company the court found was authorized to construct and operate a street railroad on said street, but had no authority and could give to defendant no right to use the street as a permanent stand for its cars. It appeared that defendant constructed the siding or turnout complained of opposite lots occupied by plaintiff, the outer track being sixteen inches from the curb of the sidewalk. The siding was used as a stand for defendant's cars, from two to four cars usually standing thereon directly in front of plaintiff's premises and cutting off access thereto.

The further material facts are stated in the opinion.

William M. Ivins for appellant. All public streets and highways are for the use of the people of the State. (*People v. N. Y. & H. R. R. Co.*, 26 How. Pr. 53; *Durham v.*

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Williams, 37 N. Y. 251; *People v. Kerr*, 27 id. 200; *Sixth Ave. R. R. Co. v. Gilbert El. R. R. Co.*, 2 Abb. N. C. 377; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 531.) Whether a municipal corporation be the owner of the fee in the streets, in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted uses as highway. (Mills' *Thompson on Highways* [3d ed.], 7; *Coster v. The Mayor of Albany*, 43 N. Y. 414; *Drake's Case*, 7 Barb. 558; *Chapman v. A. & S. R. R. Co.*, 10 id. 363, 364; *Tompkins v. Hogson*, 2 Hun, 146; *Plant v. L. I. R. R. Co.*, 10 Barb. 27; *Kelsey v. King*, 32 id. 410, 417; *Lexington & O. R. R. Co. v. Applegate*, 8 Dana, 289.) Abutting owners, as such, have no special or peculiar interest in the enforcement of the trust in the public. (*Sixth Ave. R. R. Co. v. Gilbert El. R. R. Co.*, 3 Abb. N. C. 377.) Where the fee of the street is not in the plaintiff he cannot complain when the use of the street is authorized by the charter of a company and by the municipal authorities. (High on Injunctions, §§ 637, 827, 1275; *Osborn v. B. C. R. R. Co.*, 5 Blatchf. 366; *Patten v. N. Y. El. R. R. Co.*, 3 Abb. N. C. 346; *Drake v. H. R. R. R. Co.*, 7 Barb. 508; *Hentz v. L. I. R. R. Co.*, 13 id. 646; *Chapman's Case*, 10 id. 360; *Ohio R. R. Co. v. Applegate*, 8 Dana, 289; *Stetson v. C. & E. R. R. Co.*, 75 Ill. 74; *Patterson v. C. D. & V. R. Co.*, id. 588; *P. & R. I. R. Co. v. Schertz*, 84 id. 135; *C. & I. R. R. Co. v. Heisel*, 38 Mich. 72; *Kellinger v. Forty-second St. R. R. Co.*, 50 N. Y. 211.) Plaintiff, not owning the fee in the street, has no right against the defendant as a trespasser, if it be such, but only such rights as he would have if the defendant were lawfully in possession. (*Beel v. O. & P. R. R. Co.*, 25 Penn. St. 86, 161.)

Charles H. Otis for respondent. A street railroad can make no use of the street inconsistent with its use as a public thoroughfare. (*N. Y. C. & H. R. R. R. Co. v. Kip*, 46 N. Y.

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546; *N. Y. & H. R. R. Co. v. R. R. Co.*, 50 Barb. 285, 309; *Cent. Branch Un. Pac. R. R. Co. v. Twine*, 23 Kans. 585; *Masterson v. Short*, 7 Robt. 299.) The defendant acquired no right to construct and use the turnout or siding, by reason of the ordinance of the common council of the city of Brooklyn. (*Chapman v. A. & S. R. R. Co.*, 10 Barb. 360, 363; 4 Cent. Law Journal, 410; *Plant v. L. I. R. R. Co.*, 10 Barb. 27; *Kelsy v. King*, 32 id. 460; *Tompkins v. Hodgson*, 2 Hun, 146; *Story v. N. Y. El. Ry. Co.*, 26 Alb. L. J. 373, 376; *Davis v. Mayor*, 14 N. Y. 524.) Any unauthorized use of a public street is *per se* a public nuisance, and may be enjoined at the suit of the attorney-general. (*Davis v. Mayor*, 14 N. Y. 524, 525; *Mahan v. N. Y. C. R. R. Co.*, 24 id. 658; *Wager v. T. U. R. R. Co.*, 25 id. 526; *Wash. Cem. v. P. P. & C. I. R. R. Co.*, 68 id. 591; *N. Y. El. Ry. Cases*, 3 Abb. N. C.; *Craig v. Roch. City & B. R. R.*, 39 N. Y. 97; *Carpenter v. N. Y. C. R. R. Co.*, 24 id. 655; *People v. Kerr*, 27 id. 181; *Kellinger v. 42d St. R. R.*, 50 id. 206; 6 Barb. 313; 37 id. 357; *Coming v. Lowerre*, 6 Johns. Ch. 439; *Knox v. Mayor*, 55 Barb. 404; *Goldsmith v. Jones*, 43 How. Pr. 415; High on Injunctions, §§ 522, 528; *Osborne v. B. C. R. R. Co.*, 5 Blatchf. 366.) The measure of damages in this case is that amount of money which the jury deems adequate to compensate the plaintiff for the annoyance he and his family have suffered by reason of the use of the turnout by defendant as a stand for its cars. (*Wood on Nuisances*, 887, § 853.)

ANDREWS, Ch. J. It is difficult to ascertain from the appeal book, on what precise ground the judgment in this case proceeded. The complaint alleges that the siding constructed by the defendant on Bergen street, was constructed without lawful right or authority, and alleges the circumstances of special damage sustained by the occupation of the siding for the defendant's cars, the cutting off of access to the plaintiff's lots, and the annoyance from the noise of defendant's servants in soliciting passengers, etc., and concludes by demanding judgment for damages, and for an injunction restraining the de-

fendant from using the siding for its cars, etc. The court impaneled a jury to assess the damages, reserving the question of law for subsequent decision. The jury, upon the request of the plaintiff, were instructed that in assessing the damages they were to assume that the siding was constructed without lawful right, and to take into consideration the annoyance which the plaintiff and his family had suffered from the acts of the defendant. This last instruction was duly excepted to, on the ground that the road was authorized by the common council of Brooklyn, and the jury assessed the damages at \$300. The court subsequently directed judgment for the plaintiff for the damages assessed, and for an injunction restraining the defendant from using the siding as a stand for defendant's cars. There were no formal findings of fact or law by the court. But in the memorandum of decision the judge seemed to assume the lawfulness of the structure, and placed its direction for an injunction on the ground that the South Brooklyn Railroad Company, the lessor of the defendant, could not confer any right to occupy the siding as a stand for the accommodation of the defendant's cars, and further that the defendant acquired no such right under the resolution of the common council of Brooklyn, of March 10, 1879, authorizing the defendant to lay all necessary switches and turnouts to enable it to run over the tracks leased from the South Brooklyn Company. We think it must be assumed for the purpose of this appeal that the court in finally disposing of the case, decided against the plaintiff on the issue of the lawfulness of the siding, and put its judgment solely upon the ground of an unreasonable use thereof to the detriment of the plaintiff, and that this is to be taken as the law of the case.

It is plain that the basis upon which the jury were instructed to assess the damages was inconsistent with the final ruling. The damages were assessed on the theory that the whole structure was unlawful. The damages to which the plaintiff was entitled, might be quite different in the two cases. If the structure was unlawful, the plaintiff was entitled to

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damages for all the annoyance caused by the cars in front of his premises ; if lawful, only for such as resulted from an unreasonable use of the siding. We think the defendant is entitled to a new trial on his exception to the charge to the jury.

The question presented is important. The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street, and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. The Elevated R. R. Co.* (90 N. Y. 122), recently decided ; but that case left untouched the decision in the *People v. Kerr* (27 N. Y. 188), that a horse railroad constructed under legislative authority on the surface of a city street, the fee of which was in the city, was not an unlawful interference with the rights of abutting owners, but was a street use consistent with their rights therein.

It cannot, however, be questioned that a street cannot be converted into a yard for the storing or deposit of cars, to the injury of adjoining owners. An unreasonable use of the street by a street railway, may doubtless afford a right of action to the property owners specially injured thereby. On a new trial the facts bearing upon the right of the defendant to maintain the siding, and the manner of its use, may be more carefully presented.

The judgment should be reversed and new trial granted, with costs to abide the event.

All concur, except DANFORTH and FINCH, JJ., dissenting.

Judgment reversed.

THE NEW ENGLAND IRON COMPANY, Appellant, v. THE, GILBERT (METROPOLITAN) ELEVATED RAILROAD COMPANY, Respondent.

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Two contracts, purporting to have been made by the parties, recited that said parties had caused their corporate seals to be fixed and their corpo-

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rate names thereto "subscribed respectively by their proper officers." To each contract was in fact attached the corporate seal and the proper signature of each party; the plaintiff's by a director, the defendant's by its president. In an action upon the contracts evidence was given tending to show that defendant's seal was affixed by its president in the exercise of lawful authority. *Held*, that the evidence was sufficient *prima facie* to establish that the contract was so executed as to bind both parties.

By the provisions of one of the contracts plaintiff, in consideration of the covenants therein set forth on the part of the defendant, agreed to furnish the materials and to erect on masonry to be furnished by defendant, an elevated iron railway, in New York city, conforming in all particulars to plans and specifications approved by engineers named, a copy of which specifications it was declared was annexed to the contract. Plaintiff agreed to commence erecting the railroad at such point on the route as might be named by defendant's president, and to commence work preparatory to such erection as soon as that officer should notify it that defendant's capital stock was subscribed, and thirty per cent thereof paid into the treasury. Defendant agreed to designate the order in which the work should be commenced and completed, and to pay therefor a specified price per mile in monthly payments for the work done the preceding month. Plaintiff was not required to prosecute the work any faster than money to pay therefor should be furnished by defendant. Defendant subsequently, without giving plaintiff the prescribed notice, entered into a contract with another corporation for the construction of the work. *Held*, that although defendant did not, in express terms, undertake to do the act or give the notice required to set the plaintiff in motion, a promise to do so, or at least a promise that plaintiff should have the building of the railway in case that enterprise was prosecuted by defendant, was implied.

No copy of the plans or specifications was annexed to the contract. Papers of that character, however, were produced in evidence bearing the signatures of the engineers named, which plaintiff's evidence tended to show were the ones referred to. *Held*, that the annexation of the copy of the specifications was not a condition on which the validity of the contract depended; that the originals, so far as referred to in the contract, became constructively a part of it; and therefore that the failure to annex the copy was immaterial.

Provision was made in the contract for subletting all or any part of the work, but it was declared that such subletting should not release plaintiff from its obligations, and that the sub-contractors should be regarded as plaintiff's agents. After the same was executed, and before defendant entered into the new contract, plaintiff became insolvent and assigned all of its property to trustees for the benefit of creditors, the trustees having power to make such arrangement and disposition of the company's contracts as they should deem judicious. The assignment, after

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providing for payment of all of plaintiff's debts, directed the trustees to pay over any surplus to its treasurer. Plaintiff had expended, before the assignment, several thousand dollars in necessary preparation for executing it. The trustees held the shops and machinery transferred, in order that plaintiff might resort to them to execute the contract, and plaintiff's ability so to do, notwithstanding its embarrassment, was established. The trustees settled all claims against the plaintiff and re-assigned the contracts to it before defendant entered into the new contract, and the latter was frequently notified of plaintiff's readiness and willingness to perform. *Held*, that the insolvency and assignment did not justify defendant in treating the contract as abrogated, or give cause for rescinding it, and did not discharge that company from its obligations; that the contract was assignable, but conceding it was not, then it was not embraced in the trust deed.

A contract can be rescinded only by the acts or assent of both parties.

Plaintiff is a Massachusetts corporation. After the execution of the assignment it filed certificates in the office of the secretary of that State, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation, being wholly insolvent." The court decided these certificates to be conclusive against plaintiff. *Held* error; that, while they were proper evidence, they were not conclusive in an action such as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform.

(Argued November 11, 1882; decided January 28, 1883.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 9, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing the plaintiff's complaint on trial.

This action was brought to recover damages for an alleged breach of contract.

The material facts are set forth in the opinion.

A. J. Vanderpoel and *F. J. Fithian* for appellant. If possible written instruments shall be so interpreted, *ut res magis valeat quam pereat*; and so that such a meaning shall be given as may carry out and effectuate to the fullest extent the intention of the parties. (Broom's Legal Maxims, 347; *Saunders v.*

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Clark, 29 Cal. 299.) Where it clearly appears from the acts or words of the parties, or both, that there was something contemplated to be done by one or both parties, not expressed, or imperfectly or mistakenly expressed in words, the law supplies that which is presumed to have been so inadvertently omitted by the parties and will imply that the parties have made those stipulations which as honest, fair and just men they ought to have made. (Addison on Contracts, §§ 1400, 3031; *Odgen v. Saunders*, 12 Wheat. 341; Story on Contracts, § 11; Bishop on Contracts, §§ 105, 106; *Elderton v. Emmans*, 4 C. B. 478; In Exchequer Chamber, 6 id. 158, 160; 4 H. of L. Cas. 624, 652; *Roberts v. Marston*, 20 Me. 275; *Daniels v. Harris*, L. R., 10 Com. Pleas, 1-8; *Cherry v. Smith & Co.*, 3 Penn. St. 19; *Grove v. Hodges*, 55 id. 504; *Booth v. Cleveland R. Mill Co.*, 6 Hun, 591; 74 N. Y. 15; *Jones v. Kent*, 80 id. 585; *Warner v. Wilson*, 4 Cal. 310.) If there be any thing whatever of which the law can take notice, which by reason of, or consequent upon the entering into a contract, will inure to the benefit and advantage of the covenantor or promisor, or to the burden or detriment of the covenantee or promisee (and especially the latter), it is a sufficient consideration. (2 Summary to Langdell's Selected Cases on Contracts, 1021, § 64; 1034, § 89; *Disbrough v. Nelson*, 3 Johns. Cas. 81; *B'klyn Oil Refinery v. Brown*, 38 How. Pr. 444; Story on Contracts, § 429; 1 Parsons on Contracts, 431; *Conover v. Stilwell*, 43 N. J. 54; *Andrews v. Pantue*, 24 Wend. 234; *Douglas v. Howland*, id. 35; *Rayns v. Kneeland*, 10 id. 218-250; 13 id. 114-124; *Phillips v. Morrison*, 3 Bibb [Ky.], 105; *Harrison v. Gage*, 5 Mod. 411; *Holt v. Ward*, 2 Strange, 937; *Fowler v. K. & P. R. R. Co.*, 31 Me. 197.) Where a party is under covenant or agreement, express or implied, to perform acts, on the happening of some future event or contingency, if such party, before the time fixed for the happening of such event or contingency (if the time be fixed), or if before it is physically or legally certain that the event or contingency never can or will happen (if the time be not fixed), either openly repudiates his conditional obligation, or does or suffers to be

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done any act which puts it out of his power, or the power of the other party, or both, to perform, if the contingency or event should happen, then the liability of such party becomes at once fixed and absolute, and he may be sued as for a breach. (*McIntyre v. Belcher*, 14 C. B. [N. S.] 654; *Sterling v. Maitland*, 5 B. & S. 840; *Hochster v. Delatour*, 22 L. J. [Q. B.] 455; *Short v. Stone*, 8 Q. B. 358; *Frost v. Knight*, L. R., 7 Exch. 111; *Bradley v. Benjamin*, 46 L. J. [N. S.] Q. B. 590; *Cort v. Ambergate R. R. Co.*, 6 E. L. & Eq. 230; *Price v. Williams*, 1 M. & W. 6; *Sardock v. Franklin*, 8 Ad. & El. [N. S.] 371; *Inchbold v. West N. C. Co.*, 17 C. B. [N. S.] 733; *Frost v. Tilley*, 6 B. & C. 325; *Burtiss v. Thompson*, 42 N. Y. 246; *Stewart v. Keteltas*, 36 id. 388; *Forbes v. Shattuck, M.*, 22 Barb. 568; *Howell v. Gould*, 3 Keyes, 422; *Crocker v. Holmes*, 65 Me. 195; *Shaw v. Rep. Ins. Co.*, 69 N. Y. 292; *Burrell v. Root*, 40 id. 496; *Freeth v. Burr*, L. R., 9 C. P. 208; *Frost v. Knight*, L. R., 7 Exch. 111; *Cort v. Ambergate*, 17 Q. B. 127; *S. C.*, 6 Eng. Law & Eq. 230; *Roper v. Thompson*, L. R., 8 C. P. 167; *Shaw v. Republic Ins. Co.*, 69 N. Y. 286; *Hayner v. Am. Pop. L. Ins. Co.*, id. 435). An estoppel is binding only upon parties and privies to the transaction, or act claimed as working the estoppel, and can be taken advantage of only by them. (Best's Law of Estoppel [Morgan's ed.], § 535; *Murray v. Cury*, 5 Wall. 795; *Wooster v. Green*, 2 Pick. 425; *Lange v. Filton*, 1 Rawle [Penn.], 141; *Braintree v. Hingham*, 17 Mass. 432; *Mills v. Mills*, 8 Watts & Serg. 135.) The evidence relied upon by defendant as tending to show inability and unreadiness on plaintiff's part should have been excluded under its objection as immaterial and incompetent. (*Howell v. Gould*, 3 Keyes, 422; *Turner v. Johnson*, 7 Dana [Ky.], 434). One who for any cause claims a right to rescind an executory contract without consent of the other parties must give notice of his intention to do so. (*Parmelee v. Adolph*, 28 Ohio, 10; *Held v. Wright*, 75 Ill. 17; *Skinner v. Newbury*, 51 id. 205; *Carney v. Newbery*, 24 id. 203; *Mullen v. Bloomer*, 11 Iowa, 360.)

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A party who would rescind must do so distinctly and unequivocally. (*Skinner v. Parker*, 36 N. H. 449; *Wicks v. Robie*, 42 id. 316; *Clarkson v. Mitchell*, 3 E. D. Smith, 269; *Jewett v. Pettit*, 4 Mich. 679; *Hendricks v. Goodrich*, 15 Wis. 679.) Defendant's seal affixed to the contract raises the presumption that it was properly affixed by the proper officer, acting within the powers conferred upon him, and that the contract was the authorized agreement of defendant. (*Lovett v. Steam Saw Mill Ass'n*, 6 Paige, 56, 60; *Clark v. Farmers' Wool Mfg. Co.*, 15 Wend. 256; *Whitney v. Union T. Co.*, 65 N. Y. 576; *Parkinson v. City of Parker*, 85 Penn. St. 313; *Benedict v. Denton*, Walker [Mich.], 336; *Lovering v. Mayor*, 7 Humph. [Tenn.] 553, 558; *Lansing v. The Mayor, etc., of Memphis*, id. 558; *City of Memphis v. Adams*, 9 Heisk. [Tenn.] 518; 1 Kyd on Corporations, .268; 1 Ventner, 257; 3 Keb. 307; *Lavitt v. S. S. M. Ass'n*, 6 Paige, 56; *Clark v. Farmers' Manuf. Co.*, 15 Wend. 236; *Clark v. Imp. G. L. Co.*, 4 B. & Ad. 315; *B'k of Vergennes v. Warren*, 7 Hill, 51; *Com. B'k of Buffalo v. Kortright*, 22 Minn. 348; *Miners' Ditch Co. v. Zollerback*, 37 Cal. 597.) If Foster was not authorized by an express vote or by the tacit understanding and consent of all the directors to execute the contract, there should be most complete proof to the contrary. (*Whitney v. Union T. Co.*, 65 N. Y. 576; *B'k of Middlebury v. R. R. Co.*, 30 Vt. 159; *Wild v. N. Y. & A. S. M. Co.*, 59 N. Y. 644; *Susq. B. & B'k v. Gen. Ins. Co.*, 3 Md. 305; *Tenney v. E. Warren Lumber Co.*, 43 N. H. 348; *N. Y. Central R. R. Co. v. Bastian*, 15 Md. 494; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520.) Even if Foster's act in executing the contract was originally unauthorized, the subsequent acquiescence and failure to repudiate it for over two years bound the defendant. (*Olcott v. T. R. R.*, 27 N. Y. 546; *Woodbridge v. Proprietors*, 6 Vt. 204; *Walworth Co. B'k v. F. L. & T. Co.*, 629; *Zabriskie v. C. C. & C. R. R. Co.*, 23 How. [U. S.] 381; *Reuter v. Electric Tel. Co.*, 6 El. & Bl. 341; *Bargate v. Shortridge*, 5 H. L. Cas.

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297, 318; *Totterdell v. F. Brick Co.* L. R., 1 C. P. 674; *P. W. & B. R. R. Co. v. Cowell*, 28 Penn. St. 329; *Evans v. Smallcome*, L. R., Eng. & Ir. App. Cas. 249.) The defendant is presumed to have had knowledge of the alleged unauthorized act of Foster, which it failed to repudiate. (*Fulton B'k v. Benedict*, 1 Hall, 614; *B'k of U. S. v. Davis*, 2 Hill, 451; *Union G. M. Co. v. Rocky Mt. Nat. B'k*, 2 Col. 248.) The failure to annex the specifications did not render the contract incomplete. (*Cook v. Allen*, 67 N. Y. 578.) The change of structure did not abrogate the contract. (*Williams v. Vanderbilt*, 28 N. Y. 217; 29 Barb. 491; *Harmony v. Bingham*, 12 N. Y. 99; *Beebe v. Johnson*, 19 Wend. 500; *Wheaton v. Com. M. S. Ins. Co.*, 82 N. Y. 543; *Niblo v. Binsse*, 1 Keyes, 476, 3 Abb. N. C. 301.) The objection that the transfer to trustees and the reassignment to plaintiff, each or either, terminated the contract, is untenable. (*Devlin v. Mayor*, 63 N. Y. 8.) The claim that by the insolvency, assignment of property to trustees, and suspension of its operations for over a year, the company was dissolved, and consequently cannot maintain this action, is untenable. (*People v. Phoenix B'k*, 24 Wend. 431; *Mech's' B'ldg Assn. v. Stevens*, 5 Duer, 617; *Tower v. Hale*, 46 Barb. 361; *Kineaid v. Dwinelle*, 5 J. & S. 332; *S. C.*, 59 N. Y. 548; *Atty.-Gen. v. B'k of Niagara*, Hopkins, 361; *Brinkerhoff v. Brown*, 7 Johns. Ch. 217; *Briggs v. Penniman*, 8 Cow. 387, 391, 395; *Michles v. Roch. City B'k*, 1 Paige, 125; *Brandt v. Benedict*, 17 N. Y. 97; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Boston Manuf'y v. Langdon*, 24 id. 49; *Knowlton v. Ackley*, 8 Cush. 95; *Hurd v. Talbot*, 7 Gray, 113; *Coburn v. B. P. M. Mfg. Co.* 1 Gray, 243; *Folger v. Col. Ins. Co.*, 99 Mass. 267. *In re New South Meeting House*, 95 id. 504

Francis C. Barlow for respondent. Without the plans and specifications alleged to be annexed the contracts were insensible and void for uncertainty. (*Weeks v. Maillardet*, 14 East, 368; *Moir v. Brown*, 14 Barb. 50; *Kercheis v. Schloss*, 49 How. 286.) Construed in the light of the surrounding circumstances,

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the alleged contracts are clearly provisional and incomplete upon their face and by their terms inoperative; the expressed conditions not having happened and the defects not having been supplied. (*Grierson v. Mason*, 60 N. Y. 397; *Seymour v. Cowing*, 1 Keyes, 585, 536; *Dietz v. Farish*, 53 How. 217; *Ford v. James*, 2 Abb. Ct. of App. Dec. 163; *Hutchins v. Hebbard*, 34 N. Y. 24; *Cipperly v. Cipperly*, 4 T. & C. 345; *Baldwin v. Middeberger*, 2 Hall's Sup. Ct. 184; *Fullerton v. Dalton*, 85 Barb. 236; *Hughes v. Merc. Mut. Ins. Co.*, 55 N. Y. 268-269.) The alleged contracts were not executed by the defendant or by its authority. There was no express authority. (Laws of 1872, p. 2179; 2 R. S. [Banks' 6th ed.], p. 391, § 6; *Skinner v. Dayton*, 5 Johns. Ch. 351; *McCullough v. Moss*, 5 Denio, 577; *Soper v. Buffalo R. Co.*, 19 Barb. 312; *Darcy v. Tamar Co.*, L. R., 2 Exch. 162; *Brady v. Mayor*, 2 Bosw. 183; *Leggett v. N. J. B'k Co.*, Saxt. Ch. 559.) There is no presumption of authority. (*Jackson v. Campbell*, 5 Wend. 576; *Skinner v. Dayton*, 5 Johns. Ch. 35; *Leggett v. N. J. B'k Co.*, Saxt. Ch. 559; 7 Hill, 51; *L. & F. Ins. Co. v. Merch., etc., Co.*, 7 Wend. 34.) But if such a presumption be allowable, it is displaced by proof of the actual and complete authority under which the president was acting. (Burr on Cir. Ev., 36; 3 Black. 371.) There is no implication of authority. (*Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *McCullough v. Moss*, 5 Denio, 575; *Hoyt v. Thompson*, 1 Seld. 320; 27 N. Y. 557; *Risley v. I., etc., R. R. Co.*, 1 Hun, 202, 204; 62 N. Y. 245; *L. & F. Ins. Co. v. Mech. F. Ins. Co.*, 7 Wend. 31, 33; *Jackson v. Campbell*, 5 id. 572, 576; *Dabney v. Stevens*, 40 How. 351; 17 Mass. 30; *Leggett v. N. J. B'k Co.*, Saxt. Ch. 559, 560; *Adrience v. Roome*, 52 Barb. 411; *Brady v. Mayor*, 2 Bosw. 183; *Mech. B'k v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 632; Story on Agency, § 76.) There was no ratification by the defendant. (*Salem B'k v. Gloucester B'k*, 17 Mass. 30; *McCullough v. Moss*, 5 Denio, 577; *Dabney v. Stevens*, 40 How. Pr. 349, 350; *Spackman v. Evans*, L. R., 3 H. of L. 171, 194, 195; *Whitney Arms Co. v. Barlow*, 63 N. Y. 68; *DeGroff*

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v. *Am. Linen Thread Co.*, 21 id. 127; *Bradley v. Bul-
lard*, 15 Ill. 417.) The alleged contracts were not executed by
the plaintiff, or by its authority, and there was, therefore,
want of mutuality. (*Wylde v. N. R. R. Co. of N. J.*, 53 N.
Y. 156, 163-4; *Townsend v. Corning*, 23 Wend. 435; *Tucker
v. Woods*, 12 Johns. 190.) To sustain the plaintiff's cause of
action, proof was required that it was at all times able and will-
ing to perform its obligations under the alleged contracts.
(*Peck v. Collins*, 70 N. Y. 382; *Champion v. Joslyn*, 44 id.
653; *Porter v. Rose*, 12 Johns. 209; *Dunham v. Mann*, 8 N.
Y. 513; *Lester v. Jewett*, 11 id. 453.) The plaintiff is estopped
by its official reports from denying its inability to perform. (1
Greenleaf on Evidence [Redf. ed.], § 210; *Peck v. Burr*, 10
N. Y. 297; *Hewlett v. Hewlett*, 4 Edw. Ch. 7; *Freeman v.
Walker*, 6 Greenl. 68; *Rex v. Clarke*, 8 Term Rep.
220; 3 R. S. [6th ed.] 750, 748, § 50; *Briggs v. Penniman*,
8 Cow. 387; *Slee v. Bloom*, 19 Johns. 456; *B'k of Pough-
keepsie v. Ibbottson*, 24 Wend. 473; *Bradt v. Benedict*, 17 N.
Y. 93.) The alleged contracts were entire, and the legislative
abrogation of the defendant's route below Chambers street
rendered performance impossible and released both parties from
their executory obligations. (*Dexter v. Morton*, 47 N. Y. 64-
65; 2 Smith's Lead. Cas. 50; *Carpenter v. Stevens*, 12 Wend.
589; *Giles v. Crosby*, 5 Bosw. 389, 394, 395; *Jones v. Judd*,
4 N. Y. 411; *Brick Pres. Church v. New York*, 5 Cow. 538;
Kildreth v. Buell, 18 Barb. 110; *People v. Bartlett*, 3 Hill
571; *People v. Manning*, 8 Cow. 297; 24 Barb. 176, 177;
Constitution, art. 8, § 1; *Elevated Railroad Cases*, 3 Abb.
N. C. 372-466.) It is the duty of assignees to elect,
within a reasonable time, whether they will adopt the
contracts of the bankrupt. (*Smith v. Gordon*, N. Y.
Leg. Obs. 325, 328; *Streeter v. Sumner*, 31 N. H. 558.) In
order to recover, the plaintiff must prove that it was at all
times ready and willing to perform. (*Nelson v. Fire Proof
Co.*, 55 N. Y. 480, 484; 1 Chitty on Contracts [11th Am. ed.],
424; *Lawrence v. Knowles*, 5 Bing. N. C. 399; *Peck v.
Collins*, 70 N. Y. 382.) The insolvency of the plaintiff and

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the assignment relieved the defendant from all obligations under the contract. (*Devlin v. The Mayor*, 63 N. Y. 8, 18-19; *Knight v. Burgess*, 33 L. J. [N. S.] Ch. 727.) Certain contracts imply the condition of continued and unchanged existence, so that any change is a breach. (Benjamin on Sales, § 570; *Taylor v. Caldwell*, 3 B. & S. 824; *Seipel v. Ins. Co.*, 84 Penn. St. 47, 49; *Knight v. Burgess*, 33 L. J. [N. S.] Ch. 727.) The fact that Mr. Foster was "president" implies nothing whatsoever as to his authority. (*Risley v. R. R. Co.*, 1 Hun, 202, 204, 205; 62 N. Y. 240, 245; *Adriance v. Roome*, 52 Barb. 399; *Ins. Co. v. Ins. Co.*, 7 Wend. 31, 33; *Morse on Banking* [2d ed.], 143, 144.) Conversations with Mr. Foster were, therefore, merely conversations with third persons, strangers, and they in no way bound or affected the defendant. (*Budlong v. Van Nostrand*, 24 Barb. 28.) A statement to a third person, that the defendant waived the breach, would not affect any thing, not having been made to the other party to the contract, but to a stranger. (*Traver v. Halsted*, 23 Wend. 70.)

DANFORTH, J. Notwithstanding the arguments addressed to us, both orally and in writing, by counsel for the defendant, we find it impossible to say there was not a question for the jury, which, if answered by them in favor of the plaintiff, would have required an assessment of damages for the breach of contract set forth in the complaint. Moreover, since the oral argument, the discussion has been so continued by the contending parties through printed briefs, that we are at once brought to a consideration of that question as presenting the vital point in the case.

The facts are simple. Upon the trial the plaintiff put in evidence two contracts bearing date, the one March 24, the other March 27, 1873, purporting to have been made between it and the defendant, each reciting that the parties had caused their corporate seals to be affixed and their corporate names thereto "subscribed respectively by their respective proper officers" on the day of its date; and to each there is in fact

the true corporate seal of each party and the proper signature of the corporation by one of its officers, the plaintiff's by Mr. Wiggin, a director, the defendant's by Mr. Foster, its president. By its provisions the plaintiff, in consideration of certain covenants and promises by the defendant, in the contract set out, undertook to furnish all the materials for, and erect on masonry to be furnished by the defendant, an elevated iron railway in the city of New York, conforming in all particulars to the plans and specifications approved by Edward H. Tracy and Henry A. St. John, a copy of which specifications is declared to be annexed and to form a part of the contract "so far as the said specifications refer to the work above said masonry." The beginning and end of the road is indicated, but it is provided that changes may be made as the defendant shall thereafter designate in writing. The plaintiff agreed to commence erecting the railway at such point on the route as might be named by the defendant's president, and to commence work preparatory to such erection as soon as he should notify the plaintiff "that the capital stock of said railway company is subscribed and thirty per cent thereof paid into the" defendant's "treasury, and, provided such notice shall be given on or before the first of April" then "next," to prosecute the work and the erecting the railway, and have the same completed from Chambers street to Forty-second street by the 1st day of January, 1874. Provision is made for subletting the construction of any or all parts of the railway, "it being understood, however, that such subletting shall not release the" plaintiff from any of the obligations or undertakings in the contract expressed, and that such sub-contractor or contractors are to be regarded as the agents of the plaintiff. The time for the completion of the railway is fixed, provided the defendant seasonably furnishes the masonry. In consideration of these things the defendant agrees to designate the order in which erection of the railway shall be commenced and completed, and pay the sum of \$735,000 per mile, and in certain cases \$23,000 per mile additional — as for extra material and labor — in monthly payments of ninety-five per cent of the contract price of all work done and

material furnished and put in place during the month preceding; but it is also provided that the plaintiff shall not be required to prosecute the construction of the road any faster than money to pay therefor shall be furnished by defendant. No copy of specifications was annexed to the contract.

It was held in the court below that the contract was complete both in form and substance, and so executed as to bind both parties; but the trial judge dismissed the complaint because upon the evidence he was of opinion that the plaintiff was itself in fault, and the General Term by a divided court have affirmed his decision. The dissenting judge was for a new trial for error in that conclusion.

We have been led by the argument of the respondent to examine both propositions, but as to the first think it sufficient to say, that we agree with the court below in the opinion that the contract is mutual in all things, and valid and binding on the parties. Its object was within the powers conferred by law upon the defendant (Laws of 1872, chap. 885, p. 2179, vol. 2), and its intention to effect it, was manifested by its common seal. In one view of the facts the seal was affixed in the exercise of lawful authority, and was sufficient to sustain the plaintiff's case, until impeached. Whether the defendant's evidence was enough for that purpose, was at least a question for the jury. (*Burrill v. President, etc., of the Nahant Bank*, 2 Metc. 163; *Lovett v. Steam Sawmill Ass'n*, 6 Paige, 54; *Whitney v. Union Trust Co. of N. Y.*, 65 N. Y. 576.)

Nor do we think it material that the copy plans and specifications referred to in the contract were not in fact annexed to it. Papers of that character were introduced in evidence, executed in duplicate, and bearing the signatures of the persons named. As the evidence stood, the jury might have found they were the ones referred to, and if so, it was sufficient. The work is to conform to "the plans and specifications"—meaning of course the original plans and specifications. It is true the parties say "a copy of which said specifications is hereto" (that is to the contract) "annexed," but the qualification, "so far as the said specifications refer to the work" indicated, relates to

the originals, and in case of difference, they would furnish the criterion by which to determine whether the railway when completed did conform to the agreement. The copy, whether annexed or not, would not govern. Its annexation would furnish a ready mode of determining that question, but the binding quality would be in the original. It was its office to describe the plan, and the copy could not diminish the stipulations, which a reference to it incorporated into the chief agreement. The annexation of the copy specifications was not a condition on which the validity of the agreement depended. If annexed the identification might be more satisfactory, but without that, the contents of the plans and specifications, so far as referred to in the agreement executed, became constructively a part of it, and in that respect made one instrument. (*Cook v. Allen*, 67 N. Y. 578; *Tonnele v. Hall*, 4 id. 140.) Although the defendant does not in express terms undertake to do the act, or give the notice which shall set the plaintiff in motion, a promise to do so, or at least a promise that the plaintiff shall have the building of the railway if that enterprise is prosecuted by the defendant, is clearly to be implied from the covenants and stipulations which were inserted and to some of which I have above referred, to make the contract binding on the plaintiff. There is manifested a clear intention on the part of the defendant to construct the railway, and for that purpose do certain things, among others, raise the money, provide the masonry and give instructions to the plaintiff. These things and others on the part of the defendant, the plaintiff by the contract acquired an interest in having performed, and there is an obligation for their performance to be implied in its favor. (*Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15; *Jones v. Kent*, 80 id. 585; *Roberts v. Marston*, 20 Me. 275; Add. on Cont., § 1400.)

Upon the question as to which the learned judge differed in opinion from his associates, we think he was in the right. Of course if, as the respondent contends, the contract was broken and abandoned by the plaintiff, no recovery could be had upon it. But what was the condition of the parties at the time of the breach complained of? In October, 1873, the plaintiff con-

veyed all its real estate and personal property to Daniel C. Holden, William M. Whitney and Edwin R. Wiggin in trust for the benefit of its creditors with power, among other things, in their discretion, to make such arrangement and disposition of any and all contracts of said company as they should deem judicious. On the 24th of November, 1875, these trustees in due form reassigned the contracts of March, 1873, to the plaintiff, with intent, as they declared, to revest the full title in it, and the rights secured thereby, as fully and entirely as if the assignment of October 9, 1873, had not been made.

It is obvious that the first act looking to the performance of the contract was to be taken by the defendant, for it was only after notice of funds in the treasury that the plaintiff was to go on; but this need not be argued, for it was conceded by the learned counsel for the respondent before us that the first act under the contract (treating both papers as being one contract) was to be done by the defendant, and that this act was not done. Nor is the commission of the act of which the plaintiff complains denied. It stands conceded that in February, 1876, negotiations were entered into between the defendant and a corporate body known as "The New York Loan and Improvement Company," for the construction in substance of the very work covered by the contract which I have described, and these negotiations, on the 6th of March, 1876, resulted in a contract for that purpose, binding on both parties. This is the breach on which the plaintiff relies, and it is admitted by the defendant, but its learned counsel contends that the assignment by the plaintiff and the conduct of it, and its trustees, let loose the defendant and justified it in treating the contract as abrogated and rescinded. This was also the ruling below, and such was the course of the trial that the material question is whether the assignment by the plaintiff, to which I have above referred, and the acts and declarations of its officers after it, were such acts of disqualification to perform, as in and of themselves discharged the defendant from the obligation of the contract of March, 1873. I put it in this form, because up to the time of the alleged breach, I discover no evidence of any intention on

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the part of the plaintiff to make an end of the contract, nor any notice to the defendant of a disposition to do so, nor the omission of any act to the performance of which it was bound. It should also be borne in mind that the plaintiff has not at any time ceased to be a corporation. It has remained capable of acquiring and holding property (*Bradt v. Benedict*, 17 N. Y. 93.), and there has been no period of time during the transactions disclosed in the record, when it was not liable to be sued (*Kincaid v. Dwinelle*, 59 N. Y. 548; *Revere v. Boston Copper Co.*, 15 Pick. 351), nor when it might not also sue. (*Boston Glass Manufactory v. Langdon*, 24 Pick. 49.)

The defendant contends that the contract was not assignable. If that should be conceded it would follow that it was not embraced in the trust deed, and the question before us would be easily answered. But as to that the court below held otherwise. The matter of the contract involved no personal relation or confidence between the parties, or exercise of personal skill or science, for the contractor was a corporation and its work was necessarily to be done through agents or servants. There are no words restraining its assignment, and the mere fact that the persons representing the contractor are assignees, and not merely agents or servants, will not operate as a rescission of, or constitute a cause for terminating, the contract. (*Devlin v. The Mayor*, 63 N. Y. 8.) It could be rescinded by the acts or assent only of both parties, and here there is no evidence that the plaintiff, at any time, intended to abandon or dissolve it. On the contrary there is evidence of an expenditure on its part of several thousands of dollars in necessary preparation for executing the contract, before assignment, and no evidence of a refusal, at any time, fully to perform it. In fact the time had not come for the plaintiff to do more than it had done.

Did it evince an intention to be no longer bound by the contract? It is not contended that it did. The respondent relies upon its assignment and insolvency as showing an inability to perform, and upon that, not as evidence for the jury, but as calling for a legal conclusion that thereby the defendant was

set free. But the plaintiff was not relieved from the obligation of the contract. Suppose the defendant had, after the assignment, taken the first step, and called upon the plaintiff to perform. There was nothing in the nature of things to prevent the plaintiff, or its trustees, from complying. Suppose it had failed to comply. Then there would have been nothing to prevent a claim for damages on the part of the defendant for its non-compliance. If established, the claim would have been good against the assets, if any there were in the hands of the trustees, not otherwise appropriated, or any property acquired by the corporation. But as the case stood there was no repudiation of the contract, no refusal to perform, no evidence even of inability. The discussion of this proposition is very much limited by the frank and explicit statement of the learned counsel for the defendant, that he does not claim that mere bankruptcy is a rescission by the plaintiff. Much less does that follow a voluntary assignment. Bankruptcy applies the effects of the debtor to the discharge of his obligations, and then releases him from the weight of them. The assignment in this case had no such consequence. It did not change the relation between the contracting parties. The plaintiff still remained the contractor and responsible to the defendant for the performance of his contract with them. (*Mandeville v. Reed*, 13 Abb. Pr. 173.)

We think it unnecessary to repeat here the English cases cited by the respondent as to the effect of insolvency or bankruptcy upon contracts made by the insolvent. They have been examined, but the case before us, as it now stands, is not within them. There was in fact no rescission by the plaintiff, nor evidence that the conduct of the defendant was induced either by a belief that there was a rescission, or a belief that the plaintiff intended to abandon the contract, or that the defendant in such belief had likewise abandoned it. Indeed at the time of the breach by the defendant, there had been no notice to the defendant, actual or constructive, of the circumstances now relied upon as a defense. It is claimed that notice should have been given by the plaintiff or the plaintiff's assignees of

an intention to stand by the contract. But such notice could not be necessary until, by the omission of some necessary act on their part, the defendant had been justified in coming to the conclusion that the other party intended to abandon it. Such circumstances raised the question of mutual rescission in *Ex parte Chalmers* (L. R., 8 Ch. App. Cas. 289), and in *Morgan v. Bain* (L. R., 10 Com. Pleas, 15). What acts or proceedings then of the plaintiff or its assignees do work that result? "The insolvency and the assignment of the plaintiff?" These things, the learned counsel says, "relieved the defendant from all obligations under the contract." His reasons are: first, the contract is not assignable; second, an implied condition that the contracting party shall not change its status or condition. The first I have already considered, and we discover nothing from which such a condition can be implied. Varying fortunes in an individual or a corporation are within the common experience of all, but it has not been thought that the obligation of a contract was affected by that circumstance.

If dissolution had taken place, a very different question would come up. Dissolution was not even thought of. The assignment itself, after providing for the payment of all the debts of the plaintiff, directs the trustees to pay over to its treasurer such surplus as might remain, and there is evidence tending at least to show that its assets were considerable, that every claim was settled and its means of raising money ample for any purpose required by the contract. It was, however, held by the trial court that a *prima facie* case as to the plaintiff's ability to carry out the contract, notwithstanding its embarrassment, had been made out, and the plaintiff's counsel did in fact, upon this intimation, forbear further evidence. The ruling upon that point, therefore, must be regarded at this stage of the case as final.

There is evidence also that the trustees held the shops and the machinery — the works, until 1878, in order that the plaintiff might resort to them to execute the contract at any time it had orders to do so. There is evidence of repeated communications to the defendant — one in the fall of 1873, immediately

after its failure and just before or just after the assignment, and some as late as the spring of 1876 — of a desire and readiness on the part of the plaintiff to execute the work, and that the shops were retained for carrying out the contract. But all this the trial court held insufficient, by reason of certificates made by the plaintiff in 1874 and 1875, and filed in the office of the secretary of the State of Massachusetts, to the effect that it ceased operations in September, 1873, and on October 8, 1873, transferred its entire property, real and personal; to trustees for the benefit of its creditors, and now has only a nominal organization for the purpose of liquidation, being wholly insolvent." The certificates were under the oath of the officers of the corporation, and the learned judge held them conclusive against the plaintiff. In this there was error. The certificates were evidence, but excluded no other evidence. It is unnecessary to inquire how far the statements would conclude the corporation in any proceeding by the State — the State is not concerned — nor how far the affiant, if a witness, might be affected if he gave a different version of the matters referred to. His credibility would be for the jury. But no statute has been cited which gives to the papers the force claimed for them as evidence, nor have we any precedent which requires a court to hold them conclusive in a civil action by the corporation to assert its right of property.

If the corporation was not in fact dissolved — as it clearly was not — if it was not relieved from the obligations of the contract — and this we hold — then upon the whole evidence which might be produced by the parties, it was for the jury to say whether the plaintiff was able and ready and willing to execute the contract, and if it was, then, whether by the defendant's violation of it, the plaintiff sustained damages. As to the evidence already in, we forbear comment. As the case now stands it was not properly disposed of at the Circuit.

The judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur

Judgment reversed.

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JOSEPH BLUMENTHAL, Respondent, v. ROBERT J. ANDERSON et al., WILLIAM K. HALL et al., Appellants.

A judgment having been perfected in this action against plaintiff for costs and for damages occasioned by a temporary injunction issued therein, a settlement was made between the parties and a release executed by defendants in fraud of the rights of H. & B., their attorneys, which release was set aside on motion. An action was then brought by said attorneys against the parties herein to determine and enforce their lien upon the judgment. Before the trial thereof the plaintiff here was discharged in bankruptcy. Judgment was rendered and perfected adjudging the former judgment to be in full force and unpaid, and that the attorneys had a lien to an amount specified, and were entitled to enforce a collection thereof. On motion under the Code of Civil Procedure (§ 1268), to have the judgment herein canceled and discharged of record because of the discharge in bankruptcy. *Held*, that plaintiff was not barred by the judgment in favor of the attorneys; that said judgment had no other effect than to determine the extent of and to enforce their lien, leaving the original judgment, like other debts of the bankrupt, subject to the bankrupt law; and that he was entitled to the relief sought.

(Argued December 12, 1882; decided January 23, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 27, 1882, which reversed an order of the Special Term, denying an application on the part of plaintiff to have the judgment against him canceled and discharged of record. (Reported below, 28 Hun, 93.)

It appears from the papers submitted that this action was commenced in January, 1875, for the purpose of setting aside a conveyance alleged to be fraudulent, and to compel the specific performance of a contract. The defendants employed Messrs. Hall and Blandy, as their attorneys, to appear for them and defend the action. In July, 1876, a judgment was entered in favor of the defendants, against the plaintiff, dismissing the complaint and for \$3,126.80 costs. This sum was further augmented by an award for damages to the defendants for \$750, granted because of a temporary injunction which, on plaintiff's application, had been issued herein. Said attorneys

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gave written notice to the plaintiff that they claimed a lien upon the judgment for their services, and notified him not to settle with any persons other than themselves, and also gave similar notice to the plaintiff's attorneys. They then commenced an action in the Court of Common Pleas against the plaintiff and defendant to determine and enforce their lien. No personal claim was made against plaintiff. The parties notwithstanding the notice had a settlement and defendants executed a release of the judgment. Subsequently an order was granted to show cause why the release and satisfaction-piece should not be set aside, and said attorneys have leave to issue execution; the result of which was, that the satisfaction-piece was vacated and set aside and the clerk of this court directed to take and remove the same from the files of his office and mark the docket of the judgment in his office as restored to full force. In April, 1880, in the action brought by Messrs. Hall and Blandy, as aforesaid, judgment was entered against the defendants here for the sum of \$5,400 and costs, also adjudging, among other things, that the judgment against plaintiff remained in full force and wholly unpaid, and a lien thereon to the extent of \$5,400 existed in favor of said attorneys, and that they were entitled to enforce the collection of the same and the award, and apply the same toward the payment of their judgment. In January, 1880, plaintiff was discharged in the bankruptcy proceedings from all debts existing on the 31st of August, 1878, on which day the petition for adjudication was filed by him, and in March, 1882, an order was granted to the plaintiff to show cause, founded upon his proceedings in bankruptcy, upon which the application, aforesaid, was based.

Nathaniel C. Moak for appellants. It is not enough that the record shows irregularity or gross error; the defect must involve jurisdiction. (*Falkner v. Guild*, 10 Wis. 563, 572.) Granting more, or greater, relief than is asked for by the complaint is, at most, an irregularity which can only be taken advantage of by motion in the suit in which it is granted. (*Peck v. N. Y., etc.*, 85 N. Y. 246, 250-1; *Hunt v. Hunt*, 72 id. 217, 228-30; *Jordan v. Van Epps*, 58 How. Pr. 338, 348;

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Clarke v. Holdridge, 40 id. 320; *Holbrook v. Dominy*, 69 N. Y. 238; *Krekeler v. Ritter*, 62 id. 372, 374-5; *Jenkins v. Fahey*, 73 id. 359.) A judgment taken contrary to express agreement is legal and valid, and cannot be treated collaterally as a nullity. (*Whitaker v. Merrill*, 28 Barb. 526.) Whatever relief the plaintiff is entitled to he should have obtained in the Common Pleas action by pleading his discharge in bankruptcy, which had been rendered prior to the trial and judgment. (*Monroe v. Upton*, 50 N. Y. 593, 595; *Stilwell v. Coope*, 4 Denio, 225; *Clark v. Rawlings*, 3 N. Y. 216.) A discharge in bankruptcy is no bar to an action on a judgment subsequently recovered. It is not material that the judgment was entered on a default taken before the discharge was granted. (*Revere v. Cooper Co.*, 15 N. Y. W'kly Dig. 349.) A subsequent promise to pay avoids a discharge. (*Dusenbury v. Hoyt*, 53 N. Y. 521; *Graham v. O'Hearn*, 11 Week. Dig. 547; *Dewey v. Moyer*, 72 N. Y. 70-75.)

Joseph Ullman for respondent. A judgment obtained before the debtor has been granted a discharge in bankruptcy must, on proper application, be canceled if it is covered by the discharge. (*Am. Ex. B'k v. Brandreth*, 12 Hun, 384; *Fel lows v. Kittredge*, 56 How. Pr. 498; *In re Brandreth*, 14 Hun, 585; Code, § 1268.) The bankrupt discharge on its face includes the judgment in question, and cannot be collaterally impeached. It is "conclusive evidence" of the fact and regularity of the discharge, and cannot be attacked in a State court. (*Ocean Nat. B'k v. Olcott*, 46 N. Y. 112; Blumenstiel on Bankruptcy, 554; *Monroe v. Upton*, 50 N. Y. 593.) If a judgment gives greater relief than the complaint demands, it is void. (*Simonson v. Blake*, 20 How. Pr. 484.) A promise, in order to revive a debt, must be clear, distinct and unequivocal. (Blumenstiel on Bankruptcy, 552; *Allen v. Ferguson*, 9 Bankr. Reg. 481; 18 Wall. 1.)

DANFORTH, J. The settlement of the judgment in favor of Anderson and others, against Blumenthal, was in fraud of the

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rights of Hall and Blandy, but when the settlement was annulled, those rights were restored and the parties stood as before. The action brought by them in the Court of Common Pleas was to establish the extent of their interest, and the judgment had no other effect. So long as the judgment debt existed, it was theirs, and to be enforced for their benefit. It was subject, however, like other debts, to the bankrupt law, and the judgment debtor having been discharged from his debts, pursuant to its provisions, was entitled to have the judgment canceled and discharged of record. (Code of Civil Procedure, § 1268.)

The order of the Special Term, denying this relief, was therefore properly reversed, and the debtor's application granted by the General Term. The reasons assigned by that court for its action have not been satisfactorily answered by the appellant and we think its order should be in all respects affirmed.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK v. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

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Where a registered policy life insurance company which has entered into a contract with a general agent for his services for a specified term at a stipulated salary, before any breach of the contract on its part, is restrained from further prosecuting its business or exercising its corporate franchises by order of the court, and a receiver of its assets is appointed in proceedings under the insurance law (§ 7, chap. 902, Laws of 1869), the agent has no valid claim upon the fund in the hands of the receiver for damages for alleged breach of the contract, because of the discontinuance of the employment: at least, in the absence of evidence that it was some fault of the company which induced the superintendent of the insurance department to make the certificate upon which the attorney-general acted. There is, in such case, no breach on the part of the company as performance is prevented, and the contract dissolved by the action of the State.

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The difference between the position of agents and that of policy-holders pointed out.

It seems that as between the company and one of its officers thus contracting with it, its dissolution by virtue of such proceedings is to be deemed the independent act of the State, and not the act of the corporation, whatever may have been the cause prompting the act. The officer so contracting takes the risk of any act or neglect on the part of the other officers which tends, under the law, to produce dissolution.

(Argued December 12, 1882; decided January 23, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 1, 1882, which affirmed an order of Special Term dismissing a claim presented by James O. Mix upon the fund in the hands of the receiver of the defendant.

The facts were stipulated substantially as follows:

Defendant was a registered policy life insurance company, organized under chapter 902, Laws of 1869. In December, 1876, said Mix entered into its employment as general agent, under a contract by which he was to receive a specified annual salary for a term of not less than five years. In May, 1879, the superintendent of the insurance department made the certificate provided for by section 7 of said act, and delivered it to the attorney-general, who thereupon commenced this action and obtained an order therein restraining defendant, its officers, etc., from the further prosecution of its business or the exercise of any of its corporate franchises. A receiver of the corporation was duly appointed and it was dissolved. Mix continued in the discharge of his duties under the contract until June 15, 1879, when he was notified by the receiver of his appointment, and of the dissolution of the company.

Edward C. James for appellant. This claim is provable against the assets. (*People v. Security L. Ins. Co.*, 78 N. Y. 115, 125; *Lewis v. A. M. L. I. Co.*, 61 Mo. 534; *In re Eng. J. S. B'k*, *Yelland's Case*, L. R., 4 Eq. 350; *In re L. C. Co.*, *Clark's Case*, L. R., 7 Eq. 550; *In re L. & S. B'k*, *Logan's Case*, L. R., 9 Eq. 149; *In re E. & S. M. Ins. Co.*, *McClure's*

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Case, L. R., 5 Ch. App. 737; *In re P. F. C. Co.*, *Dean and Gilbert's Case*, 41 L. J. Eq. [N. S.] 476; *In re H. G. Co.*, L. R., 1 Ch. App. 77; Laws of 1869, chap. 902, § 8; *Att'y-Gen. v. A. M. L. Ins. Co.*, 77 N. Y. 336-339, 340; *Att'y-Gen. v. N. A. L. Ins. Co.*, 80 id. 152-154; *People v. Nat. Ins. Co.*, 82 id. 287.) The insolvency of the company entitles a stockholder to an injunction restraining the prosecution of its business. (*Osgood v. Maguire*, 61 N. Y. 524; *Lewis v. Atlas M. L. Ins. Co.*, 61 Mo. 534.) The performance of a contract will not be excused for any cause against which the contracting parties might have provided, except the act of God, or a true *vis major*, for which the party in default is in no way to blame. (*Harmony v. Bingham*, 12 N. Y. 107-8; *Tompkins v. Dudley*, 25 id. 272.) Even sickness and death will not in all cases relieve the party from making compensation in damages. (*Clark v. Gilbert*, 26 N. Y. 284; *Danolds v. State*, 14 Weekly Dig. 437.) Claimant was entitled to recover as damages the agreed salary from the last payment to the expiration of the five years with a rebate of interest from the dates when said sums became due to June 1, 1879; and should be charged with what he has earned during said period, and also with a small indebtedness owing by him to the company. (*Howard v. Daly*, 61 N. Y. 371-378; 82 id. 287; L. R., 4 Eq. 350; 7 id. 450; 9 id. 149.)

Geo. W. Wingate for receiver. All contracts for personal services are made upon the implied agreement that both the contracting parties will continue to live and do business, and the contract is terminated by the death or sickness of either the employer or the employed, the servant being merely entitled to his services to that date. (*Farrows v. Wilson*, L. R., 4 Com. Pleas, 744; *Wolf v. Howes*, 24 Barb. 174; *Fahy v. North*, 19 id. 341; *People v. Manning*, 8 Cow. 297; *Carpenter v. Stevens*, 12 Wend. 589; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brow*, 11 Metc. 440; *Beebe v. Johnson*, 19 Wend. 502; *Ryan v. Dayton*, 25 Conn. 188; *West v. Boylston*, 4 Pick. 101; 10 Am. Juria. 250-253; *Ferrington v. Greene*,

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7 R. I. 589, 594; Story on Partnership, § 341; *Tasker v. Shepherd*, 6 H. & N. Exch. 575; *Charnley v. Winstanley*, 5 East, 266; Chitty on Cont. [11th Am. ed.] 1076; *Walker v. Tucker*, 70 Ill. 527; *Stewart v. Loring*, 5 Allen, 306; *Knight v. Bean*, 22 Me. 531; *Spaulding v. Rosa*, 71 N. Y. 40; *S. C.*, 27 Am. Rep. 7; *Taylor v. Caldwell*, 3 B. & S. 826; *Sturges v. Vanderbilt*, 73 N. Y. 390; *Munma v. Potomac Co.*, 8 Pet. 286; *Merrill v. Suffolk B'k*, 31 Me. 57; *Read v. Frankfort B'k*, 23 id. 321; *Rhodes v. Forwood*, L. R., 1 App. Cas. 256; *Orr v. Ward*, 73 Ill. 317; *Thurnell v. Balbernie*, 2 M. & W. 786, 790; *Brogden v. Manott*, 2 Scott, 703, 710; *Worsley v. Wood*, 6 T. R. 710; *Davison v. Moore*, 3 Dougl. 28; *Milner v. Field*, 5 Exch. 829; *Morgan v. Birnie*, 9 Bing. 672; *Smith v. Brady*, 17 N. Y. 173.) Where a servant is to be paid in proportion to the work done there is no obligation on the master's part to provide work. (*Sykes v. Dixon*, 9 Ad. & El. 693; *Williamson v. Taylor*, 5 Q. B. 175, 671; *Lees v. Whitcomb*, 5 Bing. 37; *Dunn v. Sayles*, id. 685; *King's Accumulative L. Fund Ass. Co.*, 3 C. B. [N. S.] 151; *Hercules Ins. Co. v. Brinker*, 77 N. Y. 435.) After the State had dissolved the Globe and enjoined it and the claimant as one of its agents from issuing any policies, all obligation to pay such agent for work which was thus enjoined was at an end. (Laws of 1859, § 7; *People v. At. Mut. Life*, 73 N. Y. 171, 181; *Loomis Case*, 3 Ld. Cairns' Dec.; Albert Arbitration Act, p. 177; *Manning v. John Hancock Life Ins. Co.*, 9 Ins. L. J. 417, 420; *Ex parte v. McClure*, L. R., 5 Ch. App. 737; *Hercules Ins. Co. v. Brinker*, 77 N. Y. 435.) When a contract is terminated by the act of the law, the party is entitled to be paid for his services to that date only, and has no claim for damages against the person employing him. (*Jones v. Judd*, 4 Comst. 412; *Tonting v. Hubbard*, 3 B. & P. 291; *Melville v. De Wolff*, 82 E. C. L. 846; *Cutter v. Powell*, 2 Smith's Lead. Cases, 53; *Pollard v. Schaffer*, 1 Dallas, 210; *Babcock v. Murphy*, 20 La. Ann. 339; *Watkins v. Robert*, 23 id. 167; *Melville v. De Wolf*, 4 El. & Bl. 844; *Ball v. Liney*, 44 Barb. 505; *Sands v. Same*, id. 626; *Whitfield v. Zellnor*,

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24 Miss. 663; Wood's Master and Servant, 387; *Sterling v. Maitland*, 5 B. & S. 849, 852.)

John C. Keeler for attorney-general. The act of the State which dissolved the corporation, and prohibited it from exercising its corporate franchises, and its agents from doing business for it, annulled appellant's contract, and he cannot recover for salary thereunder after the date of the service of the injunction order. (*Reed v. Frankfort B'k*, 23 Me. 321; *Knight v. Bean*, 22 id. 531; *Beebe v. Johnson*, 19 Wend. 502; *Mumma v. Potomac Co.*, 8 Peters, 287; *Sterling v. Maitland*, 5 B. & S. 848-850; Laws of 1869, chap. 902, §§ 7, 8; *Jones v. Judd*, 4 N. Y. 414; *Whitfield v. Zellnor*, 24 Miss. 663; *People v. Bartlett*, 3 Hill, 570; *Wolfe v. Howes*, 24 Barb. 176; *Dermott v. Jones*, 2 Wall. 7; 2 Parsons on Contracts, 186; *Cobb v. Harmon*, 23 N. Y. 150; *Wellington v. West Boylton*, 4 Pick. 103; *People v. Manning*, 8 Cow. 299; *Carpenter v. Stevens*, 12 Wend. 589; *Heine v. Myer*, 61 N. Y. 177; *Melville v. De Wolf*, 4 E. & B. 842; *Presbyterian Church v. City of New York*, 5 Cow. 538; *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 622; *Knight v. Bean*, 22 Me. 431, 536; *Spalding v. Rosa*, 71 N. Y. 40; *People v. Manning*, 8 Cow. 297.) The court had the right to dismiss appellant's claim because it would have been inequitable and unjust to allow him to participate with the policy-holders in the distribution of the assets of this insolvent corporation. (Laws of 1869, chap. 902, § 8; *Commonwealth v. Eagle F. Ins. Co.*, 14 Allen, 348; *Reed v. Frankfort B'k*, 28 Me. 318-320, 321; *Sawyer v. Hoag*, 17 Wall. 621; *Lawrence v. Nelson*, 21 N. Y. 158.) The general agents and other officers of the company ought to have no equities superior to those of the policy-holders. (*People v. Security Life*, 78 N. Y. 126; *N. Y. Ins. Co. v. Statham*, 93 U. S. 34.)

FINCH, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and

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was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. (*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 292, 293; *James v. Burchell*, 82 id. 113.) He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. (*Jones v. Knowles*, 30 Me. 402.) So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. (*People v. Security Life Ins. Co.*, 78 N. Y. 115.) Then, too, the subject-matter of the contract was that of skilled personal services to be

rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of *Mix* differs from that of the policy-holders. We held in the *Security* case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It ante-dated such dissolution and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken and for that reason interfered, and when its decree of dissolution came it had to deal with broken contracts and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. (*Yelland's Case*, L. R., 4 Eq. 350; *Clarke's Case*, L. R., 7 Eq. 550; *Logan's Case*, L. R., 9 Eq. 149; *Maclure's Case*, L. R., 5 Ch. App. 737; *Dean & Gilbert's Case*, Law Jour., 41 Ch. [N. S.] 476.) In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding up orders were made and the liquidators appointed. When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break

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what was already broken. Still another class of cases is obviously different. (*People v. National Trust Co.*, 82 N. Y. 283.) They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not to be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a neces-

sary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the ship-owner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved (*Melville v. De Wolf*, 4 E. & B. 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault, or that of the ship-owner, was held sufficient. Then, too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the

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intervention of the law ; nor the company that its investments, honestly and prudently made, would shrink beyond repair, and bring down a dissolution by the State. If, in such case, in some sense, such dissolution may be deemed the act of the company ; in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a *vis major*, his own act ; so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act ; not at all the product of its own volition ; and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract, when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfillment of the law's conditions. In the event of such corporate death the motive of the State, or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion ; and, however it may have been provoked or induced, it must be deemed the act of the State, and not of the corporate body. And it is the independent act of the State, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow, or may not follow. The superintendent of insur-

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ance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does it is his act, and not the company's; dependent wholly on his volition and not on that of the corporation; an independent agency guided by its own motives, and not the act of the company producing its own death.

If it be asked where this doctrine leaves the policy-holders, and their claims for breach of contract, the answer is two-fold. Where the dissolution follows an impaired reserve, their contracts, as we have already said, were broken by the company before the State interposed. But their rights go much deeper than that. For while in the *Security case*, we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. If the State had dissolved this company while its contracts with the policy-holders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policy-holders on a different ground. The assets to be distributed would be the reserve or so much of it as remained. That reserve, as we showed in the *Security case*, is made up of the excess of premiums paid by the policy-holders in the earlier years of their policies beyond the real cost of insurance to enable them to be carried in later years when the risk should be greater. Practically, therefore, at the date of dissolution the reserve represents the earnings of the policies and the contributions of the policy-holders. And as, in the case of contracts for personal services dissolved without fault by death or the act of the law, the contract is apportioned, and the servant entitled to his actual earnings to the date of dissolution, so the policy-holders would be entitled to the just earnings of their policies to the same date, and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equitable ownership which gives them a right beyond that of mere creditors seeking dam-

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ages for a breach of contract. To make, and to carry out contracts of insurance, is the very object of the corporation, and the sole purpose of and excuse for its existence. The State gives it life for that end, and takes it away when the result is not reached. It watches it during life to see that it fulfills the purpose for which it was created, and buries it when that purpose fails. And as in the creation of the company, and in its supervision and control the rights of the policy-holders and their safety are the paramount considerations, so they remain paramount when corporate death is inflicted. The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a court of equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policy-holders in equity; and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and therefore no shadow of an equity against the assets, the policy-holders resisting his claim are protected by an equity not to be overlooked or disregarded.

Other considerations of very serious import were adverted to by the courts below, which we need not here discuss. What has been said sufficiently indicates our opinion that no error was committed in rejecting the claim of the general agent.

The order should be affirmed.

All concur.

Order affirmed.

HENRY W. WINNE et al., Respondents, v. THE NIAGARA FIRE
INSURANCE COMPANY, Appellant.

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Where a letter of instructions from a principal to his agent is equivocal, and fairly susceptible of different interpretations, and the agent in fact is misled, and adopts and follows one while his principal intended another, the latter is bound and the agent exonerated.

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Where by a policy of insurance issued to the owner of mortgaged property, the loss, if any, is made payable to the mortgagee to the extent of his mortgage interest, the owner and the mortgagee may properly be joined as plaintiffs in an action upon the policy.

In an action upon an alleged contract of insurance it appeared that F., a general agent of the defendant, authorized to bind the company by his contracts in the first instance, had insured a building on property belonging to plaintiff H. W. W., for several years to the amount of \$2,000, the policies being each for one year. The last policy expired July 1, 1876. Defendant, in accordance with its usual custom, sent to F., in June preceding, a paper called an "expiration sheet," showing the policies expiring in July; opposite the policy in question was written the word "drop." Thereupon F. agreed to reinsure the building for \$1,000. A policy was written by F. who directed it to be reported to defendant and it was entered by his clerk in the register of completed contracts, but before delivery the building was burned. F. had been accustomed to give the insured credit for premiums and to hold the policies until called for. *Held*, that the circumstances authorized an inference that the parties intended the new policy to be for the same time and at the same rate of premium as the policy which had just expired, the two differing only in amount; that, therefore, a finding that the minds of the parties met and a completed contract of insurance was entered into was justified; also, that the word "drop" was not an absolute prohibition against any insurance, but authorized the construction put upon it by F., that the risk was to be reduced.

(Argued December 13, 1882; decided January 23, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 23, 1881, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was upon an alleged contract of insurance.

For some years previous to July 1, 1876, defendant had insured a hotel known as the "Eagle Hotel," belonging to plaintiff, Henry W. Winne, upon which was a mortgage executed by him to his co-plaintiff, Benjamin J. Winne. The policies were each for one year and for \$2,000; the last one expired at the date above mentioned. The policies were issued by one Fredenburgh, a general agent of the defendant, who was intrusted with blank forms of policies executed by defendant's officers, and was authorized to make contracts of insurance, the

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company reserving the right to cancel and terminate the risk. In June, 1876, defendant, in accordance with its usual custom each month, sent to Fredenburgh a paper called an "expiration sheet" containing the policies issued by him which expired in July. Opposite the entry of plaintiff's policy thereon was written the word "drop." Shortly after July 1, 1876, Fredenburgh told plaintiff that he had received a letter from defendant to the effect that it would not carry as large an amount as \$2,000, and, as he testified, showed to them the word "drop" on the expiration sheet. It was thereafter agreed that defendant would reinsure for \$1,000 and Fredenburgh agreed to issue a policy. A policy was filled out by his clerk under his directions for that amount, which was entered in the register of policies issued, and report thereof was made to defendant. Fredenburgh had been accustomed to give Winne (the owner) credit for insurance and to hold the policies until called for. The next day after such agreement was made the hotel was destroyed by fire.

John J. Linson for appellant. There was never any contract completed between the parties. (*Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Wood on Fire Ins.* 15, 16-23; *May on Ins.* 52-57; *Wood v. Poughkeepsie Mut. Ins. Co.*, 32 N. Y. 619; *Trustees of First Bap. Church of B'klyn v. B'klyn F. Ins. Co.*, 19 id. 305; 28 id. 153; *Tyler v. N. A. F. Ins. Co.*, 4 Rob. 451; *De Grove v. Met. Ins. Co.*, 61 N. Y. 602; *Strohn v. H. Ins. Co.*, 37 Wis. 625; *Sargent v. Nat. F. Ins. Co.*, 86 N. Y. 626; *Gardner v. Ham. Ins. Co.*, 33 id. 421; *Hughes v. Merc. Ins. Co.*, 55 id. 265; *Sandford v. Trust F. Ins. Co.*, 11 Paige, 547; *Chase v. Ham. Ins. Co.*, 20 N. Y. 52; *Meade v. Westchester Ins. Co.*, 3 Hun, 608; *Mackey v. Mut. Ben. L. Ins. Co.*, 103 Mass. 78; *Orient Ins. Co. v. Wright*, 23 How. [U. S.] 401; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Rogers v. Charter Oak L. Ins. Co.*, 41 id. 97; *Lindauer v. Del. Mut. Safety Ins. Co.*, 13 Ark. 461; *Cotton States L. Ins. Co. v. Scurry*, 50 Ga. 48; *Winneskie Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Wallingford v. Home Ins. Co.*, 30

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Mo. 46; *Oroghan v. N. Y. Underwriters' Agency*, 53 Ga. 109; *Christie v. North British Ins. Co.*, 3 C. C. S. 360; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Ellis v. Albany City Ins. Co.*, 50 id. 402; *Angell v. Hartf. Ins. Co.*, 59 id. 171; *Audubon v. Excelsior Ins. Co.*, 27 id. 216.) Even if the verbal agreement had been complete Fredenburgh could not have bound the defendant under the circumstances of this case. (*Johnson v. Jones*, 4 Barb. 373; *Stainer v. Lysen*, 3 Hill, 279; *Banorgee v. Hovey*, 5 Mass. 26, 27, *Sanford v. Handy*, 23 Wend. 260; *Bank v. Aymar*, 3 Hill, 262; *Dunlap's Paley on Agency*, 200; *Ewell's Evans on Agency*, 102; *Ins. Co. v. Willkinson*, 13 Wall. 22; *U. S. v. Williams*, 1 Ware, 181; *Mech. B'k v. N. Y. & N. H. R. R. Co.*, 3 Kern. 599; *Pole v. Leask*, 9 Jur. [N. S.] 829; *Vail v. Judson*, 4 E. D. Smith, 165; *Walsh v. Hartf. F. Ins. Co.*, 73 N. Y. 5; *Clark v. Met. B'k*, 3 Duer, 248; *Story on Agency*, § 127; *Howard v. Braithwaite*, 1 Ves. & B. 209; *Stainer v. Tyssen*, 3 Hill, 279; *Barnard v. Wheeler*, 24 Me. 279; *Marvin v. Un. L. Ins. Co.*, 85 N. Y. 278; *Alexander v. Caldwell*, 83 id. 480.) There was sufficient notice to put a third person upon inquiry. (*Williamson v. Brown*, 15 N. Y. 364; *Whitehead v. Bonhevir*, 1 You. & Coll. Exch. 303; *How. Ins. Co. v. Halsey*, 4 Sandf. 577; *Baker v. Bliss*, 39 N. Y. 74; *Wade on Notice*, 292; *Reed v. Gannon*, 50 N. Y. 345.) It is no excuse for the plaintiffs if, as they contend, they did not carefully examine the notice in question. (*Upton v. Tribilcock*, 91 U. S. 50; *Hill v. S. B. & N. Y. Ry.*, 73 N. Y. 361; *Germania Ins. Co. v. M. & C. Ry.*, 72 id. 90; *Gallup v. Dederer*, 3 T. & C. 710.) If Fredenburgh not only informed the plaintiff of the existence of a limitation on his powers, but also misstated the extent of the limitation, the defendant is not bound by such misstatement. (*Mech's' B'k v. N. Y. & N. H. R. R. Co.*, 3 Kern. 632; *Stringham v. St. Nicholas Ins. Co.*, 3 Keyes, 280; 4 Abb. Ct. App. Dec. 315; *Gould v. Town of Sterling*, 23 N. Y. 463; *Howard v. Norton*, 65 Barb. 161.) There is a misjoinder of parties plaintiff. (*Mann v. Herkimer Ins. Co.*, 4 Hill, 187; *Howard v. Albany*

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Ins. Co., 3 Denio, 305; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 210; *Jones v. Felch*, 3 Bosw. 63; *Emory v. Erskine*, 66 Barb. 9; *Boyton v. C. & E. M. Ins. Co.*, 16 id. 254.) A mortgagee may maintain the action alone. (*Petney v. G. F. Ins. Co.*, 65 N. Y. 6; *Frink v. Hampden Ins. Co.*, 1 Abb. [N. S.] 343; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444; *Dakin v. L. L. & G. Ins. Co.*, 77 N. Y. 600.)

J. Newton Fiero for respondents. Fredenburgh, the general agent of the defendant, did in fact insure the hotel property in the defendant for \$1,000. (*Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.) It was within the business and scope of his general agency to contract for and issue policies of insurance binding on defendant, and persons dealing with him had a right to accept and act upon his own interpretation of private and ambiguous instructions from his principal even if communicated to them. (*North River B'k v. Aymar*, 3 Hill, 266.) The statements of the agent are part of the *res gestæ* and as such binding on the principal. (*President, etc., v. Cornen*, 37 N. Y. 322; *N. Y. & N. H. Co. v. Schwyler*, 30 id. 30; *Merchs' B'k v. Griswold*, 72 id. 478; *Gould v. Town of Sterling*, 23 id. 463; *Hern v. Nichols*, 1 Salk. 289; *Albany Svgs Inst. v. Burdick*, 87 N. Y. 46; *Bank v. Aymar*, 3 Hill, 272; *Clafin v. Lenheim*, 66 N. Y. 301.) The instructions being ambiguous, the plaintiff had a right to accept the interpretation placed on them by Fredenburgh as an expert in the business of insurance, and defendant is bound by the rule that a promise is to be taken most strongly against a promisor. (*Barlow v. Scott*, 24 N. Y. 40; *Hoffman v. Etna Ins. Co.*, 32 id. 413; *White v. Hoyt*, 71 id. 505; *Herrman v. Merch. Ins. Co.*, 81 id. 188; *Chicago v. Sheldon*, 9 Wall. 50; 1 Wait's Actions and Defenses, 228; Story on Agency, §§ 74, 75, 82.) The construction of the word "drop," as to whether it was a direction not to insure for so large an amount or not to insure at all, was properly submitted to the jury. (Story on Agency, § 75; *McMorris v. Simpson*, 21 Wend. 610; *Gardner v.*

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Clark, 35 Barb. 551; *Harris v. N. R. R. Co.*, 20 N. Y. 239; *Martin v. Cope*, 23 id. 183; *Pitney v. Glens Falls Ins. Co.*, 65 id. 17; *White v. Hoyt*, 73 id. 505.) The plaintiffs were properly joined in this action. (Code, §§ 446, 448; *Boynton v. Clinton and Essex*, 16 Barb. 254; *Ennis v. Hanover Ins. Co.*, 3 Bosw. 576; *Lasher v. N. W. Ins. Co.*, 18 Hun, 101.)

ANDREWS, Ch. J. The jury found that there was an unconditional agreement on the part of Fredenburgh, to reinsure to the amount of \$1,000, and the claim of the defendant that there was no completed contract of insurance, rests upon the fact that the rate of premium and the duration of the risk, were not specified when the agreement was made. There can be no doubt that these are essential elements of a contract of insurance, and if there was no meeting of minds of the parties upon these particulars, the contract of insurance was not consummated, and the matter stood as a mere negotiation, incomplete, and imposing no obligation upon either party. The claim that there was no *consensus* of the parties upon these points, rests upon the fact that no words passed between them in respect to the time or rate of insurance, when the alleged contract was made. But this was unnecessary, provided the jury were authorized from the circumstances of the transaction, to infer that the parties intended that the new policy should be issued for the same time, and at the same rate of premium as the policy which had just expired. There was an express agreement as to the subject-matter of the insurance, the parties, the risk and the amount. The negotiation referred to a new insurance for \$1,000 on the same building insured by the previous policy,⁵ and in the same company. In the absence of negative words, it is a reasonable inference that the parties also understood that the new insurance was to be for the same time and at the same rate of premium as the prior one, differing only in amount. The policy prepared by the agent after the negotiation for the new policy, specified the same rate of premium as the prior one, and was for the usual time of one year. We think the jury were au-

thorized to find that the minds of the parties met as to all the essential terms of the contract, and that there was a completed contract of insurance between Fredenburgh and the plaintiff Henry W. Winne.

The remaining question on the merits, arises upon the defendant's claim that Fredenburgh had no authority to insure the Eagle Hotel property, and that this was known to Winne when the alleged contract was made. It is admitted that Fredenburgh was the general agent of the defendant at Kingston, at the time of the transaction. He was intrusted with blank forms of policies of the defendant, signed by its officers, and was authorized to bind the company by his contracts in the first instance, the company reserving the right to cancel policies issued by him, and terminate the risk. Under this general authority, Fredenburgh had insured the Eagle Hotel property in the defendant's company for several years, to the amount of \$2,000, the last policy for that amount expiring July 1, 1876. The alleged limitation of his authority to insure the Eagle Hotel property, is contained in a paper called an "expiration sheet," sent by the company to Fredenburgh, according to its usual custom, showing the policies which would expire during the month ensuing that in which it was sent, and containing notations opposite each risk. The particular sheet now in question, was sent in June, 1876, and contained a list of seven policies, issued at his agency, which would expire in July. Opposite the policy on the Eagle Hotel property was the word "drop," and opposite the others the word "renew." Whether this expiration sheet was seen by Winne before he made the agreement with Fredenburgh for the policy now in question, was a subject of controversy on the trial. But assuming that it was exhibited to and read by Winne before that time, so that he is chargeable with notice of its contents, we are nevertheless of opinion that the language used was not equivalent to an absolute instruction to Fredenburgh not to insure the Eagle Hotel property for any amount, and that an insurance of the property by him for a smaller sum, was not prohibited.

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The evidence tends to show, and the jury have found that the agent so interpreted the instruction. The prior policy was in fact dropped. The risk was reduced in amount. The agent prepared the new policy, directed it to be reported to the company, and it was entered by the clerk in the register of completed contracts. The word "drop" in the expiration sheet, to say the least, was ambiguous and equivocal, and the principle applies that a letter of instruction from a principal to an agent, should be expressed in clear language, and that if not expressed in "plain and unequivocal terms, but the language is fairly susceptible of different interpretations, and the agent in fact is misled and adopts and follows one, while the principal intended another, then the principal will be bound, and the agent will be exonerated." (Story on Agency, § 74. See, also, *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 188; 37 Am. Rep. 488.) In the absence of special limitation, the authority of Fredenburgh to make the contract in question is unquestionable. The limitation proved, simply prohibited the renewal of the existing risk, or an equivalent insurance. Winne had a right to put this interpretation upon the instruction. If the company intended to decline any insurance on the property, it should have said so. It cannot in justice defeat the contract in question by putting an interpretation upon its instructions, at variance with that of its agent and Winne, and of which the language was clearly capable.

The remaining question is whether a joint action lies in favor of the plaintiffs. The plaintiff Henry W. Winne was the owner of the property insured, and the plaintiff Benjamin J. Winne was mortgagee. The policy contains the clause, "loss, if any, payable to Benj. J. Winne, to the extent of his mortgage interest therein." We think a joint action is proper. The plaintiffs have a common interest in enforcing the contract. The plaintiff Henry W. Winne has no adverse interest to that of his co-plaintiff. The fund is applicable, first upon the mortgage debt, and when that is paid, the balance belongs to the mortgagor. It is we think quite appropriate, and in accord with the flexible rule of procedure now applied in courts

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of justice, to allow persons situated as are the plaintiffs, to unite in maintaining the action, and the practice is sanctioned by the language of the Code, and of adjudged cases. (Code, § 466; *Boynston v. Clinton, etc., Ins. Co.*, 16 Barb. 254; *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. 516; *Lasher v. North Western Ins. Co.*, 18 Hun, 101.)

We find no error in the record, and the judgment should therefore be affirmed.

All concur.

Judgment affirmed.

JOHN J. O'BRIEN, Appellant, v. CHARLES JONES, Assignee,
etc., Respondent.

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In an action by a vendee of personal property against his vendor for breach of warranty of title, express or implied, damages can only be recovered for actual loss.

The plaintiff in such action must establish that his vendor is without title; that another is the true owner; and that he has restored the property to such owner, that it has been taken from him under compulsory proceedings, or that he has parted with money or property in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property.

(Argued December 13, 1883; decided January 23, 1883.)

APPEAL from an order of the General Term of the Supreme Court of the city of New York, made December 30, 1880, sustaining exceptions ordered to be heard at first instance at General Term, and directing a new trial.

The nature of the action and the material facts are stated in the opinion.

Thomas G. Shearman for appellant. The sale of a chattel, of which the seller is in possession, raises an implied warranty of title. (*McCoy v. Artcher*, 3 Barb. 323; *DeFreeze v. Trum-SICKELS* — VOL. XLVI. 25

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per, 1 Johns. 274; *Thurston v. Spratt*, 52 Me. 202; *Trigg v. Ferris*, 5 Humph. 343; *Boyd v. Bopst*, 2 Dall. 291; *Eichholz v. Banister*, 17 O. B. [N. S.] 708; *Adamson v. Jarvis*, 12 Moore, 253; Story on Agency, § 107.) A principal who accepts the benefit of any act of his agent ratifies the whole transaction. (*Decker v. Judson*, 16 N. Y. 446; *Cobb v. Doros*, 10 id. 335; *Turner v. Burrows*, 8 Wend. 144.) If the plaintiff had not sold the iron, he would have been entitled to recover the full market price as the measure of damages. (*Simons v. Patchett*, 7 E. & B. 568, 572; *Bain v. Fothergill*, L. R., 7 H. L. 159, 211.) Where the vendor contracts to sell property with knowledge of the facts which show that he has no title, he is bound to make good to the vendee the loss also of the bargain sustained by his default, and this, whether he acted in good or bad faith. (*Mack v. Patchin*, 42 N. Y. 167, 175; *Pumpelly v. Phelps*, 40 id. 60; *Trull v. Granger*, 8 id. 115; *Driggs v. Dwight*, 17 Wend. 171; *Giles v. O'Toole*, 4 Barb. 261.) If the measure of damages was only the price paid, yet the defendant had nothing to do with the profit the plaintiff made upon the part resold, and would have been liable for the *pro rata* price of the seventy-one tons which he had been deprived of. (*Bagley v. Smith*, 10 N. Y. 489; *Carpenter v. Stilwell*, 11 id. 61; *Kelly v. N. Y. C. R. R. Co.*, 24 How. 172.) A mere general exception to a direction to find a verdict for the plaintiff amounts to nothing, especially when the defendant has moved to dismiss the complaint. (*O'Neill v. James*, 43 N. Y. 84, 93; *Winchell v. Hicks*, 18 id. 558; *Barnes v. Perine*, 12 id. 18; *Mallory v. Tioga R. Co.*, 5 Abb. [N. S.] 420.) It was not necessary to prove eviction by judicial process. (*Bordwell v. Collie*, 45 N. Y. 496.)

Jones, Roosevelt & Carley for respondent. Though in the sale of personal property in possession of the vendor there may be an implied warranty of title, yet there can be no recovery without proof of actual damage or loss. (*Burt v. Dewey*, 40 N. Y. 483.) In an action for a breach of warranty of title,

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the rule of damages is the price paid by the vendee with interest. (*Case v. Hall*, 24 Wend. 102; *Burt v. Dewey*, 31 Barb. 540; *Atkins v. Hosely*, 3 T. & C. 322, 328; *Armstrong v. Percy*, 5 Wend. 535.) Profits are never allowed. (*Blanchard v. Ely*, 21 Wend. 342.)

DANFORTH, J. The action is for breach of warranty of title to personal property, and stands on these facts: In November, 1873, the defendant having in his possession certain "iron stills," set in brick, undertook to dispose of them at public auction "for cash on delivery." The terms of sale provided that the articles should be taken down by the purchaser and weighed at his expense. They were struck off to Cassidy, who afterward transferred his interest under the bid to Carroll, and he paid the defendant, as on Cassidy's purchase, \$950. That sum was less than the bid and was received as partial payment. He began to remove the stills, but made delay, whereupon the defendant notified Cassidy in writing "that the goods purchased" by him must be removed from the premises at once, and Cassidy sent the notice to Carroll. The notice was not obeyed, and on the 15th day of May, 1874, the defendant offered for sale at auction the remaining stills. They were bid off by the plaintiff, and Carroll claiming to be the owner, the defendant said his "claim was no good," and thereafter the plaintiff paid, according to his bid, the sum of \$1,216.78, and received the iron. He has since sold it in parcels to different persons for an aggregate sum of \$3,077.60, more than half of which has been paid. A portion went to Jones, Henry & Co. for \$1,992.06, of which they paid \$840, but refuse to pay the balance, viz.: \$1,152.06.

The defendant requested the trial judge to dismiss the complaint upon the grounds, among others, *first*, that no title vested in Cassidy under the contract; *second*, that it did not appear that the plaintiff had sustained any damage or loss by reason of the alleged failure of title. The request was denied. The defendant, having called no witnesses, further requested the court to charge that only nominal damages could be allowed, and this

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was refused. These rulings were excepted to by defendant. The court at plaintiff's request then directed a verdict for him for a sum equal to the amount unpaid by Jones, Henry & Co. with interest, viz.: \$1,600.73. The defendant excepted. The exceptions were ordered to be heard in the first instance at the General Term, and in the mean time judgment to be stayed. The General Term has sustained the exceptions and ordered a new trial. The plaintiff, upon the usual stipulation, appeals to this court.

The trial court must have proceeded upon the ground that the title to the stills passed out of the defendant upon the sale to Cassidy, and that the plaintiff would be liable to Cassidy's vendee, Carroll, for converting the property. The General Term was of the contrary opinion, holding that as the sale to Cassidy was for cash and the price not paid, the title remained in the defendant, and that the notice given by him implied a demand to pay the sum due, and it not being complied with he had a right to resell. These questions were fairly presented upon the trial, but we deem it unnecessary to consider them, for however determined, there was still no proof upon which the plaintiff could succeed. The action was for damages and comes within the general rule, which denies a recovery when actual loss is not proven. Carroll had instituted no action against the plaintiff, nor had the plaintiff returned the property either to Carroll or the defendant, nor paid Carroll therefor, nor had he been asked to do so. As the case stands the plaintiff has sold the property, received payment in part, and has a claim against his vendees for the balance of the price of that portion bought by them. It is true that Carroll commenced an action against Jones, Henry & Co. for the property bought by them, but it does not appear that they have either surrendered it, or called upon their vendor (the plaintiff here) to defend. I think, therefore, the complaint should have been dismissed, upon the ground that the plaintiff had sustained no loss or damage by reason of the alleged failure of title. There is no pretense that the defendant was guilty of any fraud in bringing about the sale of this property.

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On the contrary, the case made upon the trial and now argued for the defendant is that of a sale accompanied by an express as well as an implied warranty of title to the goods sold. There was evidence of both. This covenant in the sale of chattels is likened to the covenant for quiet enjoyment of land (*Bordwell v. Collie*, 45 N. Y. 494; *Delaware Bank v. Jarvis*, 20 id. 226; *Burt v. Dewey*, 40 id. 283); and when the vendee relies upon it he must either restore to the true owner the property in question, or be prepared to prove its loss under compulsory proceedings, or the payment of money through judgment obtained against him, or voluntarily, in answer to a claim made, and in that case must also affirmatively establish that the claimant was the true owner and that his vendor was without title. This rule has been sustained by authority and is now to be deemed well settled. (*Case v. Hall*, 24 Wend. 102; *Delaware Bank v. Jarvis*, *supra*; *Burt v. Dewey*, *supra*; *Bordwell v. Collie*, *supra*; *McGiffin v. Baird*, 62 N. Y. 329.) These cases go upon the principle that in an action for breach of such a contract, damages can be recovered for actual loss only and not mere liability to loss, and are decisive against the plaintiff. The iron was delivered to him, and he in turn disposed of it for his own profit and still retains the price. Possibly the person whom he now alleges to be "the owner may never claim and enforce his title, or if he does, the seller may settle with him," as was suggested in *Case v. Hall* (*supra*). It is true that the vendee is not required to wait until moved by judicial proceedings (*Bordwell v. Collie*, *supra*); he may give up the property or make compensation without waiting the result of a legal contest, but one or the other he must do before he can recover against his vendor for breach of warranty.

In *Defreeze v. Trumper* (1 Johns. 274) the true owner had recovered of the vendee the value of the property. In *Case v. Hall* (*supra*), the defendants, being sued for the purchase-price of certain timber, set up that the plaintiff had no title to the timber, and that the real owner had notified the defendants that he would hold them responsible for it; but there had been no recovery by the real owner, and the defense failed, NELSON,

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J., saying "it would be highly inequitable to permit the vendee to retain the possession or enjoy the use of the property thus acquired, and put his vendor at defiance," and referring to an action by the vendee, founded on an express or implied warranty of title, lays down the rule that a recovery by the real owner is the only evidence of the breach of contract, and must be shown before such action can be maintained. This was followed in *Delaware B'k v. Jarvis (supra)*, by the declaration that in a sale of chattels with such warranty of title, in the absence of an actual dispossession under a better title, no breach can be alleged without a suit and judgment at law against the title of the vendor, COMSTOCK, J., saying "it has never been held that the mere want of title without eviction or judicial determination will sustain an action in such cases." *Burt v. Dewey (supra)*, was by a vendee for damages for breach of an implied warranty of title to a horse. Judgment against him had been recovered by the true owner, but it had not been paid, and it was held that the plaintiff must fail, "because until satisfied it only established a liability, not a loss," and the court refer to the fact that there was no evidence that the plaintiff or his vendees had ever been disturbed in their possession or enjoyment of the property, or that the plaintiff had ever parted with any money or property in consequence thereof. The court, however, in that case were inclined to qualify the rule above adverted to by suggesting that if satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it and recover its value from his vendor by affirmatively establishing that the vendor was without title. In *Bordwell v. Collie (supra)*, the qualification was approved as well sustained upon reason, and was applied to the facts then before the court. In the more recent case of *McGiffin v. Baird (supra)*, the rule as thus qualified was repeated, and upon the same principle it was said by CHURCH, Ch. J., "that if for any reason it was impracticable to return the property, perhaps the purchaser may pay the claimant its value without legal proceedings, and avail himself of it as a defense upon assuming the burden of estab-

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lishing the validity of the claim," adding, "this is the extent of the rule of protection recognized in any adjudged case, and it appears to me as far as it would be safe to carry the rule consistently with the rights of the vendor."

The plaintiff is not within any clause or sentence of the rule, even as now extended. The objection was fairly raised upon the trial, and should have prevailed. The learned counsel for the appellant argues that in any event the plaintiff was entitled to nominal damages; but if the conclusion already reached is correct, no cause of action was established, for there was no proof that the covenant was broken. If it was otherwise, however, the defendant should yet prevail, for after refusing to dismiss the complaint, the trial court refused to charge that only nominal damages could be recovered, and directed a verdict for a substantial sum. In either aspect, therefore, the learned court erred, and the General Term committed no error in granting a new trial. As this is made impossible by the plaintiff's appeal, the order of that court should be affirmed, and judgment absolute dismissing the complaint, with costs, be entered for the defendant.

All concur.

Order affirmed and judgment accordingly.

WILLIAM SIEWERT, Respondent, v. DEDERICK HAMMEL et al.
Appellants.

The purchase of a debt by one at the instance of the debtor for less than its face, the debtor himself with the knowledge of the purchaser paying the creditor the discount, is not *per se* usury.

It must be made to appear that the transaction originated in an agreement for a loan, as there can be no usury disconnected with a loan.

(Argued December 14, 1883; decided January 23, 1884.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order

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made at the October term, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant Hamel in March, 1873, which with the accompanying bond was assigned by the mortgagees in June, 1873, to Susan A. Bergen, who in July, 1874, sold and assigned them to plaintiff. The defense was usury.

The court found substantially these facts: When the mortgage became due, Mrs. Bergen caused notice to be served on Hamel that she required payment. Hamel applied to one Clegg, an attorney, to obtain the money required, stating that he required two years' time to pay. Plaintiff, hearing that Clegg had a mortgage to sell and desiring to purchase, applied to him, and an arrangement was perfected by which plaintiff agreed to purchase the bond and mortgage in question at a discount of eleven per cent. Plaintiff Hamel, Clegg and Mrs. Bergen's attorney thereupon met. Plaintiff paid to said attorney the amount of principal unpaid upon the mortgage, less the stipulated discount, which was paid by Hamel, together with the back interest. The bond and mortgage were delivered to plaintiff, who gave an extension of the time of payment for two years. The court also found that plaintiff was unaware of the amount and particulars of the payments made by Hamel; that Clegg was employed by plaintiff to examine the title and acted as his attorney for that purpose and in and about the transfer; that Clegg knew that Hamel had made arrangements to have the bond and mortgage assigned to such person as he should designate upon payment to Mrs. Bergen of the full amount unpaid.

S. Jones for appellants. The intent is essential to constitute the offense of usury, but the intent must be deduced from and determined by the acts. (*Quackenbush v. Sayre*, 62 N. Y. 346.) The offense of usury is not condoned by the want of an intent to violate the statute, or by an attempt to evade the

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statute by a resort to any device. (*Fiedler v. Darin*, 50 N. Y. 443-444.)

Edgar Whitlock for respondent.

ANDREWS, Ch. J. The counsel for the defendant Hamel correctly states that the question presented in this case is whether the transaction in question was a *bona fide* purchase of the bond and mortgage, at a discount, or a loan of money by the plaintiff to Hamel, with the bond and mortgage, as collateral, under the guise and color of a purchase, and sale of a chose in action, whereby the lender reserved or secured to himself a greater rate of interest than is allowed by law. The learned trial judge found that the transaction was a purchase of the bond and mortgage by the plaintiff, from Mrs. Bergen, the assignee. This finding is conclusive against the defendant, unless it is wholly unsupported by evidence. We think the evidence justified the conclusion of the trial judge. The form of the transaction was a purchase from Mrs. Bergen, and not a loan to Hamel. The alleged vice in the transaction consists in the fact that Hamel procured the plaintiff, through Clegg, to become the purchaser of the bond and mortgage at a discount of eleven per cent, which, by arrangement between Hamel and Mrs. Bergen, known to the plaintiff, was paid by Hamel, so that she received on the assignment of the bond and mortgage the full amount due thereon. If this was a mere contrivance to evade the statute of usury, and was in fact a loan by the plaintiff to Hamel upon the security of the bond and mortgage, under the guise of a purchase, then undoubtedly the plaintiff cannot recover. But what the real nature of the transaction was, was a question of fact and not of law. There can be no usury unconnected with the loan or forbearance of money, and a purchase of a debt by another at the instance of the debtor for less than its face, the debtor himself paying the creditors the discount, is not, we think, *per se*, usury. It may be very cogent evidence of usury, and under some circumstances, as for example, where the transaction

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originated in an agreement for a loan by the alleged purchaser to the debtor, the conclusion that the form which the transaction finally took was a mere device and cover for usury, might be well nigh irresistible.

Here there was no negotiation for a loan of money between the plaintiff and Hamel. The plaintiff, having funds on hand for investment, desired to purchase a bond and mortgage, and was informed that Clegg had a mortgage for sale, and Clegg, who in fact was acting as Hamel's agent without disclosing for whom he was acting, offered to sell, or procure an assignment to him of the bond and mortgage in question, at the discount stated. The verbal negotiation was concluded between the plaintiff and Clegg, without any knowledge on the part of the plaintiff of Hamel's relation to the transaction. Assuming that the plaintiff by subsequently constituting Clegg his agent to search the title and to see to the execution of the necessary papers, was chargeable with notice of what Clegg knew, viz.: that Mrs. Bergen was to receive the full amount of the bond and mortgage, and that Hamel was to advance the necessary sum beyond the amount to be paid by the plaintiff, this did not impress a new character upon the transaction, and turn into a loan of money to Hamel, what was intended as a purchase of a security against him. It is found in substance that the plaintiff entered into the transaction for the purpose of securing more than the legal interest on his capital. But the purpose was not unlawful. The expectation of large gains is the great motive which prompts and stimulates business enterprise. The purchase of an existing security for money, at a discount, is a common and legitimate transaction, and the purchaser may enforce it for its full amount. The question in this case is, was the transaction a purchase of the mortgage, or a loan of money on the security of the mortgage? The question has been decided adversely to the defendant, upon sufficient evidence.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

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JOTHAM W. LITTLEFIELD, Respondent, v. WILLIAM LITTLEFIELD, Impleaded, etc., Appellant.

While a debtor may confer authority upon another to make a payment for him which will be effectual as against a plea of the statute of limitations, the authority should be clearly established.

One of three makers of a joint and several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note *held* that these facts did not show an authority conferred upon the principal to make a payment as the agent of the surety, so as to take the case as to the latter out of the statute of limitations; also that they failed to establish a ratification of the payment.

Winchell v. Hicks (18 N. Y. 558), *First Nat. B'k v. Ballou* (49 id. 155), distinguished.

(Argued December 14, 1882; decided January 28, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was upon a joint and several promissory note, executed by the defendants. Defendant William Littlefield who alone defended, pleaded the statute of limitations. The note was dated March 24, 1868, payable one year from date. Said defendant William Littlefield and defendant Dorr signed in fact as sureties and for the accommodation of defendant Ira W. Littlefield, who was the son of William.

The further material facts are stated in the opinion.

Levi H. Brown for appellant. The court erred in allowing Ira Littlefield to testify, against defendant's objections, that after making the payment in February, 1875, he informed his

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father of the fact, who thereupon said "all right," and also in denying motion of defendant to strike it out, and the exceptions thereto were well taken. (*Furst v. Second Ave. R. R. Co.*, 72 N. Y. 542, 547; *Church v. Howard*, 79 id. 423; *Chapman v. Erie R. R. Co.*, 59 id. 587; *Meyer v. Clark*, 45 id. 285; 3 Keyes, 497-9; *Arthur v. Griswold*, 55 id. 400-408; 3 Hun, 70; *Erben v. Lorillard*, 19 N. Y. 299; 11 Hun, 82, 87-8; *Wardwell v. Hughes*, 3 Wend. 418.) Although defendant, the surety, requested plaintiff, the holder of the note, to induce Ira, the principal, to pay his own debt, the making the payment on this note by the principal was not a payment by defendant, or such a one as to bind him or take it out of the statute of limitations. (*Harper v. Fairly*, 53 N. Y. 442; *Van Keuren v. Parmelee*, 3 Comst. 523; *Shoemaker v. Benedict*, 1 Kern. 176, 182-4; *Bell v. Morrison*, 1 Pet. 351; *Wallis v. Randall*, 81 N. Y. 170; *Smith v. Ryan*, 66 id. 352, 356; *Bowe v. Gano*, 9 Hun, 8; *Bank v. Ballou*, 49 N. Y. 155; *Shapely v. Abbott*, 42 id. 443.) Under the old law an unconditional and unqualified promise or acknowledgment was requisite to remove the bar of the statute. (1 Pet. 351; 2 Comst. 531; 1 Kern. 183.) To remove the bar of the statute there must be a new promise to pay; there must exist the elements of a new contract. (*Kallenbach v. Dickinson*, 100 Ill. 427; *S. C.*, 25 Alb. L. J. 37.)

B. C. Maxon for respondent. The effect of the act of a partial payment by a party or his agent, as an evidence of the acknowledgment of the debt, and an implied promise to pay the residue, and thereby to arrest the statute of limitations to that date, has never been changed by statute. (Old Code, § 110; new Code, § 395; *Winchell v. Hicks*, 21 Barb. 448; 18 N. Y. 558; *Van Keuren v. Parmelee*, 2 Comst. 527; *Bk of Utica v. Ballou*, 49 N. Y. 155; 11 id. 185; *Shoemaker v. Benedict*, 1 Kern. 185; *Harper v. Farley*, 53 N. Y. 443; *Miller v. Talcott*, 46 Barb. 168; *S. C.*, 54 N. Y. 114; *Smith v. Ryan*, 66 id. 354.) Such payment is allowable to stand with equal force of a written acknowledgment or promise, and

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such payment may be made by the party or his agent. (*Van Keuren v. Parmelee*, 2 Comst. 527; *Shoemaker v. Benedict*, 11 N. Y. 185, 189; *First Nat. B'k of Utica v. Ballou*, 49 id. 157, 158; *Winchell v. Hicks*, 18 id. 558.) The common-law rules of evidence are applicable not only to prove the fact of payment, but also to prove the authority of the party who makes the payment, so made in another's behalf. Hence same not required to be in writing. (*First Nat. B'k v. Ballou*, 49 N. Y. 155; 2 Lans. 120; *Ketcham v. Hill*, 42 Ind. 64; 5 U. S. Digest [N. S.], 495; *Cleave v. Jones*, 4 Eng. L. & Eq. 514; *Williams v. Gredley*, 9 Metc. 485; *Sibley v. Lambert*, 30 Me. 253; *Read v. Hurd*, 7 Wend. 408; *Sibley v. Phelps*, 6 Cush. 172.) One maker of a note or obligation may authorize another maker to make a payment upon the note or obligation, and if so made under such authority and agency, and by such party's direction, it will, by the act, create an implied promise and arrest the running of the statute to that date; it does not make any difference whose money is used in making such payment. (*Van Keuren v. Parmelee*, 2 Comst. 527; *Shoemaker v. Benedict*, 11 N. Y. 185, 189; *Smith v. Ryan*, 66 id. 352; *Harper v. Fairley*, 53 id. 442; *Mainzinger v. Mohr*, 41 Mich. 685; 10 U. S. Digest [N. S.], 448; *Haight v. Ivory*, 16 Hun, 252; *First Nat. B'k v. Ballou*, 2 Lans. 120; affirmed, 49 N. Y. 155; *Pitts v. Hunt*, 6 Lans. 146; affirmed, 61 N. Y. 637; *Miller v. Talcott*, 46 Barb. 168; affirmed, 54 N. Y. 114; *Monroe v. Potter*, 34 Barb. 358; *Winchell v. Hicks*, 21 id. 448; affirmed, 18 N. Y. 448; *Hawley v. Griswold*, 42 Barb. 18.)

MILLER, J. If the payment upon the note in question, on the 22d day of February, 1875, of \$88.78, by the maker and the principal debtor, Ira W. Littlefield, was made by him in the name and behalf of the appellant and as his authorized agent, such payment was an acknowledgment of the debt, which was effectual to take the case out of the statute of limitations, and a promise of the appellant to pay the balance of the note. If it was authorized by the defendant, it was the same as if it

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was his own act and an unequivocal recognition by him of the existence and validity of the debt. It is by reason of such a recognition that partial payments are available in cases of this kind. The reported cases all agree upon this question. (*Shoemaker v. Benedict*, 1 Kern. 178, 185, 190; *First Nat. B'k of Utica v. Ballou*, 49 N. Y. 155; *Harper v. Fairley*, 53 id. 442; *Winchell v. Hicks*, 18 id. 558.) The plaintiff sought to establish such authority by proof to the effect that in the fall of 1874, in an interview with the appellant, he had a conversation with him in regard to the note in question; that he spoke to him about the note, stating that the payments were not made as they should be, and that he should hold him responsible; that appellant requested him to make no costs, that his son was going to be home soon and he would see him; that he said "tell him for me that he must pay the interest and as much of the principal as he can and that I say so." That the plaintiff then told him that if it was his choice he would make no costs. Then he said "wait until Ira comes home." Ira returned from the west and came to plaintiff's house in the winter of 1875. Plaintiff then told him he had been crowding his father upon the note and the latter had advised him to hold on until he, Ira, came home, and his father wanted him to say to him that he must pay the interest on that note and as much of the principal as he could; that Ira then said he would do all he could, and some months afterward came and paid \$88.78, and said that was all he could pay him then. There was also proof showing that Ira had told his father that he had made the payment, and his father replied that it was all right. The evidence in regard to the conversation between plaintiff and defendant was contradicted by the defendant, and the testimony as to the interview with Ira before the payment was made was also contradicted by Ira, and there was a conflict on the trial on the question whether any payment had been made by reason of the alleged interview between the plaintiff and the appellant, and the conversation that took place at that time. The disputed question of fact thus arising was presented to the consideration of the jury, who found adversely

to the defendant in this respect. The question, however, as to the legal effect of the testimony given was raised by a motion for nonsuit at the close of the plaintiff's case, which was denied, and by requests to charge the jury, which were refused, and by exceptions to the refusals as well as to the charge made.

In regard to the motion for a nonsuit the distinct question is presented whether there was any evidence to submit to the jury as to the authority of Ira, as the authorized agent of the appellant, to make the payment in question. In *Winchell v. Hicks (supra)*, the action was brought upon a joint and several promissory note, made by a principal and three sureties, which became due before the Code of Procedure went into operation. Five years afterward the holder called upon two of the sureties for payment, and was referred by them to the principal, who was informed of such reference, and made a payment, and it was held that the payment was such an acknowledgment of liability as to arrest the running of the statute of limitations against the two sureties. In the case cited ALLEN, J., at page 561, says the question is, "whether there is any direct recognition of the debt, or of the agency of Bowman, who made the payments, by the other defendants," and then after proceeding to state the testimony in regard to the subject somewhat in detail, he lays no stress upon the evidence as showing that any agency was created, and says: "It is sufficient that, so far as Tanner is concerned, there was an express recognition, an unqualified and subsisting admission of the debt, and of his present liability and willingness to pay it," * * * and that while he was liable to pay it the judge asks, as to Hicks, "was not his declaration a sufficient recognition of the debt to bind him?" He also holds at pages 565 and 566 that the verbal acknowledgment binds, because the debt was contracted prior to the Code, and was not within the provisions requiring such acknowledgment to be in writing. DENIO, J., and JOHNSON, Ch. J., concurred on the ground of the verbal acknowledgment, because the debt was contracted prior to the Code and was not within the provision requiring such acknowledgment to be in writing. The

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head-note of the case also shows that the decision of the court was upon this ground, and none other is stated therein, viz.: That the request of the sureties to get pay of the maker was obligatory as a verbal acknowledgment of the debt. It does not appear that the case was decided upon the ground that an agency was conferred by the request of the one paying to bind the other by his own act and payment.

It would, therefore, seem that the case cited is not an authority for the doctrine that an agency was created under the circumstances stated in said case. This case is referred to in some subsequent decisions. In the case of *Payns v. Gardiner* (29 N. Y. 146), MULLIN, J., who wrote the opinion, held that as the transaction was one of deposit and not a loan, it was not necessary to inquire, and said nothing as to the effect claimed, for payments made, and WRIGHT, J., in a dissenting opinion says: "The case *Winchell v. Hicks* affords no countenance to the position of the plaintiff's counsel. That action was upon a joint and several note, made by a principal and three sureties and the single question was whether there had been a verbal recognition of liability by the two, the sureties, so as to arrest the running of the statute of limitations," and after reciting the evidence of what the sureties said in *Winchell v. Hicks*, the judge further says: "This was held to be an acknowledgment of the debt and a sufficient recognition of liability by Tanner and Hicks to bind them." In *Van Alen v. Feltz* (1 Keyes, 332) the question was whether section 110 of the old Code extended to parol promises to pay debts existing when it was enacted, and it was held it did not. The court said: "This precise point seems to have been decided by this court in *Winchell v. Hicks* (18 N. Y. 558). One of the points ruled was that the case did not come within the provision of the Code, and the debt might be revived or continued *without any written promise or acknowledgment*." (See, also, *Lansing v. Blair*, 43 N. Y. 48, which approves this case.) It thus seems that in the cases cited where *Winchell v. Hicks* is referred to, it is uniformly cited as decided upon the question as to a new promise having been made. The learned counsel for the

respondent relied upon several of the reported cases which, it is claimed, hold that payment, under circumstances like those here presented, is a payment by the authorized agent on behalf of his principal, but we are of the opinion that none of them sustain the position contended for. The case of *Smith v. Ryan* (66 N. Y. 352; 23 Am. Rep. 60) has no application to the facts he presented. It is true that ALLEN, J., sustains the principle of agency as binding under the rules of common law, but he does not decide that a payment, made under the facts proven in the case at bar, is binding upon the principal. On the contrary, it is laid down that a payment which is to operate as an acknowledgment must be made by the debtor or his authorized agent, that is, an agent having authority to make a new promise or to perform for the party the very act which is to be the evidence of a new promise.

In the case of *Harper v. Fairley* (53 N. Y. 442), which is also relied upon, allusion is made to the case of *Winchell v. Hicks* as holding that a part payment by a surety does not relieve the demand against the principal, unless made at the express request of the principal. There can be no doubt of the correctness of this rule, but it is not apparent how its application can aid the plaintiff's case. We have examined the cases of *Munro v. Potter* (34 Barb. 358), and *Miller v. Talcott* (46 id. 171; affirmed in 54 N. Y. 114), and we are unable to discover that either of them sustain the doctrine contended for by the respondent's counsel. It will be seen upon a review of all the cases that there is no authority for the doctrine that a payment made under the circumstances proved in this case and without some authority, from one of the joint makers of the note, is binding upon the others. We think that no such payment was made here by the request and authority and by the agent of the appellant, and therefore it was not binding upon him. The most that he did was to urge the holder of the note to collect it of the maker. This conferred no direct agency upon the maker to pay for the surety, and to sanction such a rule would open wide the door to evade the effect of the statute of limitations where payment had not been

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made by the party sought to be made liable. It was intended by the Code of 1848, section 110, that all future acknowledgments, to take a case out of the statute, should be in writing. The object of this provision was to prevent perjury and to compel a party who had deferred the collection of a debt for so long a period as the statute prevented him from collecting the same, to furnish written proof of the acknowledgment provided for. The same rule is applicable to payments which take the case out of the statute. The payment itself is not a declaration, it is an act done by the party which is unequivocal and which of itself shows a recognition of the existence of the debt. While authority can be conferred on another to make such payment such authority should be established by plain and clear proof and not rest upon proof showing that the debtor urged the creditor to collect the debt of the principal, as is the case here. It follows that the judge erred in refusing to grant the motion made by the appellant for a nonsuit, and in his charge to the jury.

We are also of the opinion that there was no ratification by the appellant of the payment made by his son. The most that can be claimed is that the appellant expressed himself as gratified that his obligation on the note was decreased. This was not a ratification within the authorities. In the case of *The First Nat. Bk v. Ballou* (49 N. Y. 155), relied upon by the respondent's counsel, it was proved that there was an express ratification of the payments, receipts had been given stating in substance that plaintiff received the payments from defendant by the hand of the maker, and that a copy of the receipts with statement annexed was shown to Ballou by plaintiff's cashier, who informed Ballou that he had given the same. Ballou examined them and pronounced them all right.

No other points made require special attention and for the errors stated the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
PASQUALE MAJONE, Appellant.

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While, under the statute defining murder in the first degree (§ 5, chap. 644, Laws of 1878), the "deliberate and premeditated design" to kill essential to constitute that crime must precede the killing for an appreciable space of time, sufficient for some reflection and consideration, and the formation of a definite purpose; if sufficient for this it is immaterial how brief the space is.

Upon the trial of an indictment for said crime the evidence upon the part of the prosecution was to the effect that the prisoner, an Italian, married a young Italian girl and with her lived for a time with her parents. He did not live harmoniously with his wife and had some difficulty with his mother-in-law. He entered the room where his wife and her parents were with a friend for the purpose of procuring a paper in his charge belonging to the latter. His wife was hanging clothes out of a window, he asked her to go into a bed-room and bring out a box containing the paper. She replied that she was hanging out clothes, and that he should go and get the box for himself. He took her by the arm and led her into the bed-room, saying, "Will you go or will I go." Immediately thereafter he shot and killed her, came out with the revolver in his hand with which the shooting had been done, and putting the weapon to the head of his mother-in-law he fired and killed her. The indictment was for the last killing. The revolver belonged to the prisoner and had been for some time in his possession. *Held*, that the testimony established that the killing was intentional, deliberate and premeditated.

(Argued December 15, 1882; decided January 23, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made at the October term, 1882, which affirmed a judgment of the Court of General Sessions of the city and county of New York, entered upon a verdict convicting defendant of the crime of murder in the first degree in killing Maria Valindino Selta.

The material facts are stated in the opinion.

Theodore H. Swift for appellant.

John Vincent for respondent. The fact that the crime was committed in a mere fit of passion does not release the prisoner

from legal responsibility for it. (*Leighton v. People*, 10 Abb. N. C. 261; *Sindram v. People*, MSS. Opinion, Ct. of App.)

EARL, J. The carefully prepared and able opinion pronounced in this case at the General Term makes it unimportant that much should be written now. The defendant was tried and convicted in the Court of General Sessions of the city of New York, and hence under chapter 330 of the Laws of 1858, this court "may order a new trial if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial." With this provision of law before us, we can see no reason for granting a new trial. The defendant was convicted of murder in the first degree, and that crime is defined by the statute to be the intentional killing of a human being without the authority of law, when such killing is "perpetrated from a deliberate and premeditated design to effect the death of the person killed or of any human being." The main contention of the defendant's counsel in his argument before us was that the evidence does not justify the finding that the killing in this case was deliberate and premeditated. Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case. Here the most material facts, as we believe the evidence established them, are as follows: The defendant, an Italian street musician, about twenty-two years of age, in June, 1881, married a young Italian girl just past thirteen years of age. After their marriage they lived for a time with her parents Mr. and Mrs. Selta. He

did not at all times, as we may infer, live harmoniously with his wife, and he had some difficulty with his mother-in-law Mrs. Selta. On the morning of the 9th day of December, 1881, he left the house where he was residing and called upon his friend Rosa and conversed with him about some money he owed him, and about a receipt which he was keeping for him; and he, Rosa, returned with him to his house, and entered the room where his wife and Mr. and Mrs. Selta then were. Rosa, Mr. Selta and the defendant were the only living witnesses to what then took place there, and the two former, whose evidence is more probable and credible than that of the defendant, agree in the following version of what happened there: 'As the defendant entered the room his wife was hanging clothes out of a window, and he asked her to go into a bedroom and bring out a little box containing Rosa's receipt. She replied that she was hanging up the clothes and that he should go and get the box for himself. He replying, "will you go or will I go," took her by the arm and led her into the bedroom, saying nothing. Immediately after they entered the bedroom the two witnesses heard the report of a revolver, and he then came out with the revolver in his hand, and putting it to the head of Mrs. Selta fired it. He then started to leave the room and pointed the revolver at Rosa who attempted to intercept him, and went down stairs and fired two shots into his own person. He killed both his wife and her mother. There was no altercation on the occasion of the shooting and no provocation then, except the refusal of his wife to comply with his request. It does not appear that Mrs. Selta had any conversation whatever with him. The pistol belonged to him, and had been for some time in his possession. His account of the affair differs somewhat from that given by the other witnesses and his evidence tended to show that he was greatly provoked by what his wife did and said then, and by what his mother-in-law then did and had before said and done that morning. But we have no reason to doubt that the other witnesses gave a correct account of the affair, and their evidence leaves no doubt on our minds that the killing was intentional, deliberate and premeditated. There

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was no error in the reception of the evidence as to the conversation had by the defendant with Rosa a few minutes before the killing. That was competent, although not very important, as throwing light upon the state of his mind and his subsequent conduct, and explaining the language used by him to his wife.

We have thus noticed the only grounds of error alleged on behalf of the defendant, and are of opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

EDGAR T. BRACKETT, as Assignee, etc., Respondent, v. GEORGE HARVEY, Appellant.

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A chattel mortgage is not rendered void, as to creditors of the mortgagor, by a provision authorizing him to sell the mortgaged property and apply the proceeds of sales toward the payment of the mortgage debt.

Nor does an authority to the mortgagor to sell on credit, taking good business paper, which the mortgagee agrees to accept and apply on the debt, affect the validity of the mortgage.

So also, permission to use a portion of the proceeds of sales to purchase other property does not vitiate the mortgage, where it is coupled with a condition that the property so purchased shall be brought in and subjected to the mortgage lien by a renewal of the mortgage.

But an agreement, although outside of the mortgage and oral simply, that the mortgagor may use a portion of the proceeds of sales for his own benefit, avoids the mortgage.

Such an agreement, however, must be proved; a mere expectation of one of the parties is not sufficient; it must appear that it had the conscious, concurrent assent of both.

In an action by an assignee in bankruptcy to set aside certain chattel mortgages executed by the bankrupt, it appeared that the mortgagor had authority to sell on credit, taking business paper, which the mortgagee agreed to accept as payment, also that the former had permission to invest a portion of the proceeds of sales in the purchase of other property, in which case renewal mortgages were to be given, covering such purchases. Payments were made from time to time, and renewal mortgages were given. It was claimed by plaintiff that sales were made of

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the mortgaged property by the mortgagor to an amount more than sufficient to pay the mortgage debt, and that as against creditors it was to be considered as paid. One of the renewal mortgages was given after the alleged sales. It did not appear that any of the creditors represented by plaintiff were creditors at the time said mortgage was given. *Held*, that, as it did not appear that any adverse lien upon or right affecting the property existed at the time, it was competent for the parties to the mortgage to deal with each other in accordance with the actual condition of the indebtedness; and although sales had been made, the proceeds whereof were not applied, it was immaterial.

The doctrine of an agency in such case and of constructive payment simply applies in favor of a lien adverse to the mortgage, and may not be invoked where no such lien exists. As between the original parties the debt and security remain until actually paid.

Two other renewal mortgages were executed within two months prior to the filing of the petition in bankruptcy. *Held*, that as said mortgages were given in performance of the original contract, which ante-dated the two months, and as, therefore, the mortgagee had an equitable right to compel their execution, they were not unlawful preferences within the meaning of the Bankrupt Act, but were valid; and this, although taken with knowledge on the part of the mortgagee that the mortgagor was insolvent, in the absence of evidence that he knew that they were executed in fraud of the provisions of the Bankrupt Act.

But *held*, that this contract right to a lien upon newly-acquired property was confined to such as was purchased with the avails of property originally mortgaged, and if any of the property covered by the last two mortgages was not included in the prior mortgages and was not paid for out of such avails, as to such portion the mortgages were within the prohibition of said act.

Bruckett v Harvey (25 Hun, 502) reversed.

(Argued December 15, 1882; decided January 28, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 23, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 25 Hun, 502.)

This action was brought by plaintiff, as assignee in bankruptcy of Frank E. Darrow and Mary J. Darrow, to have certain chattel mortgages executed by the bankrupts to defendant, adjudged void as to creditors, and to compel him to account for and pay over the value of the mortgaged property, which it was alleged had been taken and converted by him.

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On November 29, 1873, the defendant, who was the lessee of a lumber yard in Saratoga Springs, and was owner of the fixtures, and of the stock of lumber therein, entered into an agreement with F. E. Darrow, by which he sold his interest in the lease and improvements to said Darrow, and also all the lumber. The purchase-money was made payable in installments. The contract provides that the purchase-price should be secured by Darrow's notes "and by chattel mortgage on the stock, and which chattel mortgage is to be renewed monthly." It was also further stipulated as follows: "And said Harvey also agrees that he will take business notes running sixty or ninety days, to be indorsed by said Frank E. Darrow, and apply the same in payment of Darrow's said notes as they fall due." In pursuance of said contract, Darrow executed and delivered to the defendant a chattel mortgage with schedule of lumber annexed. This mortgage covered all the lumber and stock sold, also the barn and other leasehold improvements. The mortgage recited that its execution was pursuant to contract given November 29, 1873. It was regularly filed in the clerk's office in Saratoga Springs. About three months subsequent to this purchase, Darrow entered into co-partnership with his mother, forming the firm of F. E. Darrow & Co. An addition was attached to the mortgage shortly after the formation of the firm, as follows: "The following items are hereby added to and made a part of the foregoing mortgage to secure the notes in said mortgage mentioned, pursuant to the agreement between the parties; and we direct that this statement be filed with the foregoing mortgage, and made a part thereof. Appended is a list of items of lumber referred to with firm signature or F. E. Darrow & Co." The mortgage was re-filed March 9, 1874. Another similar schedule was annexed and the mortgage was again re-filed May 4, 1874. On July 3, 1874, and September 18, 1874, similar annexations to this mortgage were made. Subsequently, in accordance with the original agreement, Darrow & Co. continued, periodically, to execute to the defendant chattel mortgages on their lumber in stock. Each of these last-mentioned mortgages contained

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the recital that it was executed in pursuance of the original mortgage, and the preliminary contract. The following provision is contained in all: "And the said Frank E. Darrow & Co. covenant and agree that as said lumber and property is sold and disposed of by them, they will apply the proceeds thereof to the payment of the debt hereby secured." The last three were dated respectively, July 3, August 9, and September 7, 1875. The recital of the amount of the mortgage debt is \$8,421.36 in all the last mortgages. All the property included in the August and September mortgages was covered by the mortgage of July 3, except one car-load of lath, valued at \$200.34. The total amount realized at the sale was \$5,814.26. In August, 1875, defendant took possession of the property covered by the mortgage remaining and sold it by virtue thereof. A petition in bankruptcy against F. E. Darrow & Co. was filed October 9, 1875, under which an adjudication was had December 7, 1875, and subsequently plaintiff was appointed assignee.

Further facts appear in the opinion.

Harrington Putnam for appellant. The express admission of consideration carried with it a concession of good faith. (*Groat v. Rees*, 20 Barb. 28.) The clause authorizing sales did not vitiate the mortgage, it being provided that the proceeds thereof should apply on the mortgage debt. (*Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelly*, 28 id. 360; *Miller v. Lockwood*, 32 id. 293; *Frost v. Warren*, 42 id. 204; *Caring v. Richmond*, 22 Hun, 369; *Dolson v. Saxton*, 11 id. 565, 569; *Herman on Chattel Mortgages*, § 103; *Robinson v. Elliott*, 22 Wall. 524.) Neither the execution nor the foreclosure of the mortgages contravened the bankrupt law. *Ex parte Jackson*, 1 Ves. Jr. 132; *Ex Parte Peele*, 6 Ves. 604; *Pollock's Dig. of Part. 29*; *Ryder v. Gilbert*, 16 Hun, 163; *Kennedy v. Nat. B'k of Watertown*, 23 id. 494; *Husted v. Ingraham*, 72 N. Y. 251; *Guernsey v. Miller*, 80 id. 181; *In re Hauck*, 17 N. B. R. 158; *Gattman v. Honea*, 12 id. 497; *Campbell Ass. v. White*, 16 id. 93; *Lincoln v.*

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Wilbur, 125 Mass. 249.) The prior mortgages are not merged in the two mortgages in question. (*Hill v. Beebe*, 3 Kern. 556; *Morris v. Whitcher*, 20 N. Y. 41; *Walker v. Henry*, 55 id. 130; *Barrow v. Morris*, 14 N. B. R. 371; *Brett v. Carter*, id. 301.) The preference which defendant's claim has obtained is not fraudulent by common law. (*Miller v. Lewis*, 4 N. Y. 554, 559; *Williston v. Jones*, 6 Duer, 504; *Upton v. Bassett*, Cro. Eliz. 445; Coote on Mortgages, 261; *Meux v. Howell*, 4 East, 1; *Waterbury v. Sturtevant*, 18 Wend. 353; *B'k of Auburn v. Fitch*, 43 Barb. 344, 354; *Smith v. Skeary*, 47 Conn. 47.) The mortgaged property having come to defendant's possession before rights of creditors or third parties had intervened, his rights were complete. (*Brown v. Platt*, 8 Bosw. 324; *Mitchell v. Black*, 72 Mass. 100; *Hale v. Sweet*, 40 N. Y. 97, 101, 103; *Collins v. Lockwood*, 16 Conn. 376; *Congreve v. Evetts*, 10 Exch. 298; *Cragin v. Carmichael*, 11 N. B. R. 511, 515; *Field v. Baker*, 12 Blatchf. 443; *In re Jackson*, L. R., 4 Ch. Div. 682; *In re Waugh*, id. 527; *Kennedy v. Nat. B'k of Watertown*, 23 Hun, 494; *Chase v. Denny*, 130 Mass. 566; *Chipron v. Feikert*, 68 Ill. 284; *Cameron v. Marvin*, 26 Kans. 612; *Bismark B'dg Ass'n v. Bolster*, 92 Penn. St. 123; *Summers v. Brannin*, 42 Miss. 749, 785; *Clark v. Tarbell*, 57 N. H. 328; *Nash v. Norment*, 5 Mo. App. 545.) Subsequent creditors are not in a position to compel a prior application of sales. (*Williston v. Jones*, 6 Duer, 504; *Southard v. Benner*, 72 N. Y. 424; *S. C.*, 5 Abb. N. C. 184; *Sawyer v. Turpin*, 91 U. S. 114; *Player v. Lippincott*, 16 N. B. R. 208; *White Int. B'k v. West*, 46 Me. 15; *People v. Bristol*, 35 Mich. 28, 33; *Barron v. Morris*, 14 N. B. R. 371; *Burdick v. Jackson*, 7 Hun, 488; *Gathman v. Hovea*, 12 N. B. R. 493, 495; *Ramsden v. Lupton*, L. R., 9 Q. B. 17.) The assignee in bankruptcy is subject to all equities that can be urged against a bankrupt. (*Stewart v. Platt*, 101 U. S. 731; *Douglass v. Vogeler*, 6 Fed. 53; *Jones on Chattel Mortgages*, § 241; *Stuart v. Beale*, 7 Hun, 405, 411; 68 N. Y. 629; *Jones v. Graham*, 77 id. 628.) Chapter 314 of the Laws of 1858, authorizing an assignee or other trustee for the

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benefit of creditors to disaffirm and resist transfers, acts and agreements, and maintain actions for that purpose, is applicable only to cases of actual fraud. (*Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Porter v. Williams*, 5 Seld. 142; *Southard v. Benner*, 72 N. Y. 424; 5 Abb. N. C. 184; *Booth v. Kehoe*, 71 N. Y. 341; *Bismark B'ldg Ass'n v. Bolster*, 92 Penn. St. 123; *Stevens v. Sale*, 1 Atk. 170; *In re Collins*, 12 Bank. Reg. 379; *Stuart v. Platt*, 101 U. S. 731; *In re Perrine*, 7 N. B. R. 283; *In re Kalley*, 4 Bank. Reg. 378; *Whiston v. Smith*, 2 Low. Dec. 101; *Coman v. Lackey*, 80 N. Y. 345; *Hammond v. Hudson River Iron & Manuf. Co.*, 20 Barb. 378; *Gray v. Schenck*, 4 N. Y. 460.)

Samuel Hand for appellant. The license to sell vitiated the mortgages. (*Southard v. Benner*, 72 N. Y. 424; *Mittnacht v. Kelly*, 3 Keyes, 407; *Edgell v. Hart*, 5 Seld. 213; *Russell v. Winnie*, 37 N. Y. 595, 596, 598; *Smith v. Ely*, 10 Bank. Reg. 553, 561; *Wagner v. Jones*, 7 Daly, 375; *Dodds v. Johnson*, 3 N. Y. Sup. Ct. 216; *City B'k, etc., v. Westbery*, 16 Hun, 458; *Robinson v. Elliott*, 22 Wall. 513; *Mobley v. Letts*, 61 Ind. 11; *Davenport v. Foulke*, 68 id. 382; *Barnet v. Fugus*, 51 Ill. 352; *Simmons v. Jenkins*, 67 id. 479, 483; *Collins v. Myers*, 16 Ohio, 547; *Blakeslee v. Rossman*, 43 Wis. 116; U. S. Rev. Stat., § 5046.) As neither the contract itself nor the first mortgage contained any agreement on the part of the mortgagors to apply the proceeds of sales upon the mortgage debt, the original arrangement was fraudulent as to creditors. (*Conkling v. Shelly*, 28 N. Y. 360, 363; *Smith v. Ely*, 10 Bank. Reg. 553, 562; *Harokins v. First Nat. B'k*, 2 id. 337, 340.) The last two chattel mortgages and the assignments of the accounts mentioned in the complaint, if not fraudulent and void as to creditors at common law, were void under The Bankrupt Act because they were taken by Harvey out of the ordinary course of business, and in violation of its provisions as preferential securities within two months prior to the filing of the petition on which Darrow & Co. were adjudicated bankrupts, Harvey knowing of their insolvency at the

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time. (Bump on Bankruptcy [8th ed.], p. 791, § 5128; Bankrupt Act, §§ 35, 39 as amended in 1874; Gazzam on Bankruptcy [4th ed.], 279, 280; *Wells v. March*, 30 N. Y. 350, 351; *Webb v. Sachs*, 15 Bank. Reg. 169; *Jackson v. McCulloch*, 13 id. 283; *Warren v. Tenth Nat. B'k*, 10 Blatchf. 493; *Webb v. Sachs*, 15 Bank. Reg. 168; *Cuyler v. McCartney*, 40 N. Y. 222; *Dewey v. Moyer*, 72 id. 70, 80; *Conkling v. Shelly*, 28 id. 360, 364; *Sutton v. Dillaye*, 3 Barb. 529; *Graham v. Stark*, 3 Bank. Reg. 357; *Mayar v. Herman*, 10 Blatchf. 257, 263; *Fox v. Gardner*, 12 Bank. Reg. 138; *Webb v. Sachs*, 15 id. 168.) There was no error in allowing the entries in Darrow & Co.'s books to be proved. (*Russell v. Hudson R. R.*, 17 N. Y. 134; *March v. Shultz*, 29 id. 346.)

FINCH, J. The two mortgages assailed by the assignee in bankruptcy were not void on their face, and as a legal conclusion from their express terms. Reading them, as both parties do, in connection with the original agreement of sale, and as steps in its performance, they permitted but three things, to one of which the other two were merely incidental, which differed from the ordinary stipulations of a chattel mortgage. The mortgagors were left at liberty to sell and dispose of the mortgaged property, but upon a condition involved in their covenant, that they would apply the proceeds of such sales to the payment of the debt which the mortgage secured. As subsidiary to this general provision, the two others may be fairly gathered from the agreements taken together: that the mortgagors might sell on credit, taking good business paper having sixty to ninety days to run, and which paper the mortgagee would accept and apply on the debt; and that the mortgagors might use a part of the avails of the sales to replenish and freshen their stock, but if they did, the substituted property was to be placed, by monthly renewals of the mortgages, in the room and stead of that which was sold to procure it. If we state these latter stipulations somewhat differently from the version of them given by the appellant, we are yet convinced that no other or wider statement of them is a just inference from the provisions of the original contract.

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Three cases decided in this court in rapid succession held that a chattel mortgage was not *per se* void because of a provision contained in it allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds, and applying them to the mortgage debt. (*Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley*, 28 id. 360; *Miller v. Lockwood*, 32 id. 293.) These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt. And the further doctrine of one of these cases, that under such a stipulation the proceeds realized by the agent are to be deemed realized by the principal, and as against an adverse lien, are to be applied on the mortgage debt even though not actually paid over (*Conkling v. Shelley, supra*), shows how impossible it is that any fraud, or injury to others, can be imputed to the agreement. If the mortgagor sells, and actually pays over the whole proceeds, nobody is harmed, for that only has happened which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds have not been paid over, the adverse lien is still unharmed, for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although as between mortgagor and mortgagee the debt remains, and is still unpaid. The effect we have thus given to the stipulation under discussion has received the approval of the Federal court, in a case where the whole subject was deemed open, and the true rule at liberty to be sought out, unhindered by decisions often conflicting and said to be impossible to reconcile. (*Robinson v. Elliott* 22 Wall. 524.) While holding that provisions which allow the mortgagor to sell for his own benefit are necessarily fraudulent, since they strip the mortgage of its whole force as a security to the holder, and

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make it merely a shield to the debtor, the court carefully qualified its judgment by adding that such results did not follow where the sales were to be for the benefit of the mortgagee, and their proceeds to be paid over to him. Nor does the recent case in our own court of *Southard v. Benner* (72 N. Y. 424) question this doctrine. In that case there was no agreement to sell for the benefit of the mortgagee, and apply the proceeds to the debt. The trial judge charged that if the mortgagees knew of the sales, but supposed the money was to be applied on the debt, there was no fraud in law; and the decision went upon the ground that the jury had found, and there was evidence to justify it, that the mortgagor was permitted, by the conscious assent and agreement of the mortgagee, to sell the property as he pleased for his own benefit, precisely as if the mortgage had no existence. We see no reason to doubt that on their face the mortgages here assailed were valid unless the two incidental or subsidiary facts operated to modify the result. The first of these was the implied permission to sell for good business paper, running sixty or ninety days, which paper the mortgagee was to take and apply on the debt. This stipulation is an inference from the provision of the contract by which Harvey agreed to accept such business paper as cash. No express liberty to sell the mortgaged property on credit was given, and the only proper inference of such liberty to be drawn as it respects sales of the mortgaged property is that which we have stated. It was thus a provision in entire harmony with the covenant to apply all sales to the mortgage debt. If the sales were for cash, that was to be paid over; if on a credit of sixty or ninety days secured by good business paper, that was to be at once taken as cash and applied as cash. No permission to sell in any other way was given or can be inferred from the contract, and that actually given made the paper permitted to be taken cash as between the parties, to be at once applied upon the debt. We do not see how such a provision can be said to affect injuriously the rights of other creditors. It can only become dangerous by straining it beyond any just inference, and construing it to be a general per-

mission to sell on credit without limitation. The second incidental fact is the implied permission to use proceeds for replenishing the stock; the goods bought to be substituted in the mortgage for those sold. This again is an inference from the stipulation in the original contract for monthly renewals. These could only be necessary to bring in after-acquired property, and permission to acquire it with proceeds of sales is perhaps a just inference, but then only upon condition that the substituted property be brought in and subjected to the mortgage lien. Thus understood it provides only for a shifting of the lien from one piece of property to another taken in exchange. In no respect did it permit any thing mortgaged to escape the mortgage. If it did not turn into cash or paper, which reduced the mortgage debt, it turned into other property, which became itself the subject of the mortgage lien. We think, therefore, that on the face of the papers, giving them a fair and just construction, there was nothing which constrains us to deem them fraudulent in law.

But the contention of the assignee does not stop with the inferences to be drawn from the papers themselves. He insists that outside of them there was evidence of an agreement between the parties, by the terms of which the mortgagors were permitted to use the proceeds of sales in part to meet the expenses of the business and for the support of the mortgagors and their families. Such an agreement, made at the time of the written one, but outside of it and by parol, we held in *Southard v. Benner* (*supra*), might be proved and serve to establish a fraudulent purpose; and the learned trial judge has found as a fact that at the date of the contract and of the several mortgages executed pursuant thereto, "it was understood and expected by all of the parties thereto, that the avails of the sales made in said business were to be used in the transaction of said business in paying the personal expenses of the said Frank E. Darrow and of the members of said firm, including their own and their families' support and maintenance." If there was evidence to sustain this finding, it is necessarily fatal, for such an agreement opens the door to fraud, and permits the

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mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors. To this finding of the trial court the appellant specifically excepted, and the inquiry now is, whether there is any evidence to sustain it.

We must not forget that it is an agreement which is to be proved. The mere expectation of one party or the other is not enough: it must be the conscious, concurrent assent of both. It must be proved and not merely suspected, for it is an attempt to establish fraud where innocence is to be presumed, and to contradict, by parol, the actual written agreement of the parties, and reduce that to a mere cover and artifice. When we examine the proofs, it becomes apparent that no such actual agreement was directly made. No conversation upon the subject took place. The matter was never discussed. No words were ever exchanged which conveyed such assent from one to the other. We come down at once to indirect proof, and into the region of inference. When there, we find but two sorts of evidence: one, the alleged expectation of Harvey; the other his knowledge of the conduct of Darrow & Co. and of their modes of doing business. The evidence as to Harvey's expectation was very brief and was this: To the question, "did you understand that Darrow was to go on and sell the lumber so transferred by you to him?" he answered, "yes; and he did so, as I understand, agreeing to pay me the proceeds, and *he paid me the proceeds* as fast as he received them, *except* what he used in replenishing his stock." Here the agreement is stated, and the fact which followed it. All the proceeds of sales of the mortgaged property were to be paid over, and as Harvey understood were so paid except what was used to buy new stock. He was then asked, "did you understand that he used a share or portion of the *proceeds of the business* for his own and his family's support?" Observe the point of this inquiry. It does not ask what was the agreement of the parties. That had already been stated and was written out in the mortgages subsequently given, and was inconsistent with any right of the mortgagors to divert the proceeds of the mortgaged property to their own support. The inquiry is limited to the separate

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action of one of the parties, which might prove to be a violation of the agreement. And then, too, it is the use made of a portion of the proceeds "*of the business*" and not of the proceeds of the property mortgaged, which is the subject of the inquiry. The witness answered: "I suppose he used the profits of the business for their support." This is a statement, not of his supposition when he made the contract, or when any mortgage was given, of what Darrow would do, but merely of his supposition at the moment of his testimony, and in the light of all which had been developed, of what Darrow in fact had done. And even that supposition relates to the business and the business *profits*, and not to the proceeds of the mortgaged property. Profits could only arise after the payment of debts. They could not arise out of sales of the mortgaged property until the debt representing its cost was paid. The profits realized would be the surplus remaining. Then too it was the profits of the business to which the witness referred. It is said, however, that the mortgagors must have lived out of the proceeds of the mortgaged property, because there was nothing else upon which they could have lived, and Harvey must have known the fact and, not objecting, be held to have assented. This is the general view of the case founded upon the facts occurring. We think the proposition is not sound. There were proceeds of the business outside of sales of the mortgaged property upon which Darrow & Co. could have lived without touching the latter. The purchase-price of that was about \$23,000. Deducting from it the cost of the leasehold improvements, which appears to have been \$6,250, it leaves of lumber to be sold about \$17,000 at the commencement of the business. But the actual sales of the first year are estimated at \$58,000 or nearly four times the cost of the original lumber, and while some part of the new lumber purchased went into the mortgage by additions, yet there is no ground for supposing that the whole of it did. The original mortgage was given in December of 1873, and the first addition to its schedule was in March of 1874. During the interval of three months there may have been, and judging from the size of the business, there

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must have been, many purchases and sales, the proceeds of which latter were in no manner bound by the mortgage, and could be used by Darrow & Co. as they pleased, although the understanding existed by parol which at the end of the interval was written out in the mortgage. Another period of four months intervened between mortgages C and D, and other intervals, some of two months and others of one occurred. There must have been, therefore, proceeds of the business not bound by the mortgage upon which Darrow & Co. could have lived, and that they did so is made more probable by the fact that in the end they prove to be in debt beyond the mortgage in a sum of about \$12,000, or much more than enough to account for their living and business expenses without at all trenching upon proceeds of the mortgaged lumber. And again, we find no evidence that these proceeds were, in fact, diverted from their lawful application. Harvey says they were not to his knowledge, and Darrow does not say that they were; so that there is no foundation in the facts which occurred in the transaction of the business for any inference of an agreement to divert the proceeds of the mortgaged property. We see no evidence of an agreement for such diversion, or of such diversion in fact. The debt of the mortgagee was an honest debt. Its security by chattel mortgage was just and right. Both parties have sworn that there was no fraudulent intent. The mortgagee was at times lenient, desiring the success of his debtors, but all the time supposed, and had good reason to suppose, that the property mortgaged, or that bought by its proceeds, was being steadily appropriated to the payment of the mortgage debt, until just before his seizure of the property remaining, and that seizure was made promptly upon the discovery that the security was lessening. The whole transaction impresses us as honest and just, and we cannot assent to the conclusion that it was fraudulent and void.

But the respondent still defends the judgment by seeking to apply to the case the doctrine of *Conkling v. Shelley* (*supra*). He argues that, on the assumption of the validity of the mortgages, there was nevertheless enough realized from the sales

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of the mortgaged property to have paid them in full, and such proceeds must be deemed to have been so applied, as against the assignee in bankruptcy representing creditors. Without considering the question of the actual foreclosure and possession by the mortgagee, before the filing of the petition in bankruptcy; and granting, as was held in *Southard v. Benner* (*supra*), that the assignee, representing the whole body of creditors, stands in the same position toward alleged fraudulent incumbrances as a single creditor having a lien by judgment and execution, there are still sufficient answers to the respondent's contention. He has no adequate facts as a foundation. What he relies upon, and all that he relies upon, is the estimate of Darrow that the sales of the first year reached \$58,000 and the actual receipts \$50,000; and the sales of the second year were \$20,000 and the receipts \$10,000. But these, as we have seen, were proceeds of the whole business, not of the mortgaged property alone. They were not all bound to be applied. What proportion of them came from sales of the mortgaged lumber is not shown, and we do not know. It is not made to appear that a single dollar was received from this source which was not applied as received upon the mortgage. On the contrary, the evidence indicates that it was. But whatever may be the truth, it is enough to say that we have no facts from which to infer a misapplication of any specific amount which therefore needs to be credited as a payment upon the mortgage. There is this further answer to the proposition. The creditors whom the assignee represents are not shown to have been creditors when the mortgage of July, 1875, was given. So far as we have a list of them, their debts matured thirty days and longer after that date. When contracted we do not know, but at least there is an entire absence of proof that any of them existed at that date. When that mortgage was given there was thus no adverse lien affecting, on any theory, the property, and it was entirely competent for mortgagor and mortgagee to deal with each other according to the actual facts. They did so deal, and whether moneys had been realized and misapplied or not was immaterial to the dealing, since nobody

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is shown to have been in a position to raise the question. When the new mortgage was then given it fixed and secured the debt remaining unpaid, and was valid for the full amount. We do not approve the contrary doctrine of the General Term upon this point. It proceeds upon the idea of a payment as between mortgagor and mortgagee, which is sufficient *pro tanto* to cancel the mortgage debt, and leaves to the mortgagee only an unsecured claim against his agent for moneys misapplied. But, as between them, they remain mortgagor and mortgagee, with the original debt unpaid and its security unaffected. The doctrine of an agency and a constructive payment simply describes and enforces the equity of a lien in collision, and has no existence except as incidental to that. In its absence, and as between the original parties, both debt and security remain. Harvey sold under the July mortgage as well as the others, and may rely upon it to defend his title, and in so doing cannot be charged with prior sales even if unapplied, nor with subsequent sales, since none are shown to have been made. The constructive payment equitably asserted for the benefit of an adverse lien can never apply where such lien does not exist, and the question is wholly between the original parties. That appears to have been the situation when the July mortgage was given, and limits the possibility of constructive payments to a period subsequent to its date, and to justify those there is no evidence. We must, therefore, hold that the ground of constructive payment is not tenable.

The respondent's final reliance is upon the provisions of the Bankrupt Act. The mortgages of August and September were executed within two months of the filing of the petition of bankruptcy, and are, therefore, claimed to have been unlawful preferences. The Special Term decided against this contention upon the ground that the mortgages were given in execution of the original contract, and the mortgagee had an equitable right founded upon that contract, and long antedating the prescribed two months, to compel the execution of such mortgages. The General Term did not dispute this ruling, but rested its conclusion upon a different ground. We

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think, in this respect, the courts below were right. The preference which Harvey obtained was in fact given to him and secured by the terms of the original contract. The later mortgages were but details of its execution, and gave him no new preference, since in equity, where that which is agreed to be done is treated as done, the preference already existed and could have been enforced. The cases cited by the trial court and upon the brief of the appellant fully justified this conclusion. But our construction of the original contract makes a further observation necessary. We confine the contract right to a lien upon newly-acquired property to such as was bought with the mortgage proceeds, and became incumbered by substitution. It was shown that some of the property described in the August mortgage was bought on credit and not paid for, and so was not within the purview of the original agreement. But if that be true, it is also true that the mortgage of July which preceded the petition in bankruptcy by more than the prescribed two months covered all the property specified in the later mortgages, except items amounting to about \$200. That mortgage was unaffected by the prohibition of the Bankrupt Act; the sale was made under it as well as the others, and it may be relied upon in defense of Harvey's title. And if the items of the \$200 were paid for out of sales of mortgaged property, they also are protected upon the ground first stated.

It is further urged that the August and September mortgages were taken by Harvey out of the usual course of business, and with knowledge that Darrow & Co. were in fact insolvent, and the trial court has so found. But this finding was made in April, 1879, and before the decision in this court of *Guernsey v. Miller* (80 N. Y. 184), which was rendered in February of the next year. We held in that case that the Federal statute as amended (U. S. R. S., § 5128) requires proof to avoid an assignment that the assignee received it, not only with "reasonable cause to believe" that the assignor was insolvent, but "knowing that such assignment was made in fraud of the provisions" of the act; and that such knowledge required more cogent evidence than mere belief. We find no

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proof of such knowledge. The facts relied upon are that Harvey made repeated extensions; that he sued the firm and recovered a judgment, and that he examined their books and business condition. The extensions were provided for in the original arrangement, and were matters of anticipated convenience. It was represented to Harvey, as he says and as Darrow admits, that the firm or some members of it had real estate in Virginia worth \$6,000, which they expected to sell and apply the proceeds on their purchase, but should need extensions if that fund was not realized in time. There was nothing in those extensions which indicated or tended to indicate insolvency under the existing circumstances. The judgment which Harvey recovered appears to have been upon business paper turned out to him by Darrow & Co., and which they indorsed. It is certainly possible that the suit was brought with a view to enforce collection against the makers and so relieve the indorsers, and that the latter were not expected to pay until all remedies against the makers were exhausted. The attempted proof of an examination of the books of the firm by Harvey ended in substantial failure. Darrow testified, "I saw Mr. Harvey at the yard one hundred times; he asked how we were getting along; I presume we told him something about it; I have seen him with my books two or three times; I cannot give the dates; father and Mr. Walker looked over with Mr. Harvey; I did not." Harvey testified, "I had no knowledge that Darrow & Co. were insolvent at the time I took the mortgage or took possession of the mortgaged property; I had no intent to defeat the operation of the Bankrupt Law." Darrow again said that the firm was embarrassed "at latter end and for a few weeks before they closed." Walker testified that "Harvey did not look over the books to see how the affairs stood." And again, "Harvey did talk to me a few times about their business; he asked me how they got along, and I said as they could expect, under the circumstances; that they were getting along very well; I did not go into details with him." On this state of facts it is impossible to say that the proof established even a reasonable cause for a belief

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by Harvey of the firm's insolvency, and still less of knowledge by him of an intent to work out a fraud upon the provisions of the Bankrupt Act.

It is not necessary to consider the questions growing out of the assignment of accounts. Enough has been said to show that a new trial must be had, and when that occurs it may appear, what at present is left in doubt, whether these accounts represented sales of mortgaged property in whole or in part, when and how they were payable, and whether or not they were taken absolutely at their face or otherwise. The evidence relating to them is very brief and somewhat confused. It seems best, therefore, to leave that question open for the effect of further evidence.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

PATRICK McKENNA, Appellant, v. HELENA M. EDMUNDSTONE,
Impleaded, etc., Respondent.

The rule that a general statute does not repeal a former statute upon the same subject, but limited in its application to a particular locality, unless the two statutes are inconsistent and cannot both stand, or unless the intent to repeal is manifested in the general act, applies, although the more general statute does not embrace the whole territory of the State. The Mechanic's Lien Law of 1875, for the city of New York (Chap. 379, Laws of 1875) was not repealed by the lien law of 1880 (Chap. 486, Laws of 1880), for the cities of the State.

(Argued January 16, 1883; decided January 23, 1883.)

APPEAL from order of the General Term of the Court of Common Pleas in and for the city and county of New York, made November 6, 1882, which affirmed an order of Special Term, the nature of which is stated in the opinion.

91	231
109	373
91	231
118	67
91	231
144	411

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of mechanic's lien, would be deemed included within its purview, that alone is not sufficient to indicate an intention on the part of the legislature to repeal the act of 1875. It was held by this court in *Van Denburgh v. The Village of Greenbush* (66 N. Y. 1), that chapter 558, Laws of 1869, which amended the lien law of 1854, applicable to certain counties in the State, by extending its provisions to all counties except Erie, Kings, Queens, New York and Onondaga, did not operate as a repeal of chapter 778, Laws of 1865, which enacted a special lien law applicable to the county of Rensselaer. And in *Whipple v. Christian* (80 N. Y. 523) it was held that the lien law of 1844 (Chap. 305), applicable to all the cities in the State except New York, and certain specified villages, including Canandaigua, was not repealed as to that village by chapter 204, Laws of 1858, which extended the lien law of 1854 to all the counties of the State except New York and Erie.

The statute of 1880, was a general statute within the rule we are considering, although it applies only to cities and not to the whole State. A statute affecting all males or all females, or all infants, would plainly be a general one, and on the same principle an act applicable to all cities is general, in contradistinction to a statute applicable to one city only. See *In re The Evergreens* (47 N. Y. 216).

It is claimed that the intent of the legislature in passing the act of 1880, to repeal the act of 1875, is shown by the fact that the city of Buffalo is expressly excluded from its provisions. This it is claimed affords an inference of an intention to include all the cities of the State except the one specially excepted, on the construction that the exclusion of one city, is the inclusion of the others. But we think this does not afford that clear evidence of intention which justifies us in holding that the former statute was repealed by implication. The legislature at the same session in which the act of 1880 was passed, also enacted a special lien law for the city of Buffalo (Laws of 1880, chap. 143), and the legislature for greater caution, may have excepted the city of Buffalo from the general law to prevent any doubt that the special act was not su-

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perseded. But we think it would be extending the inference beyond its legitimate limits to infer from such exception an intention to repeal the act of 1875. The New York City Consolidation Act of 1882 (Chap. 410, § 1807, *et seq.*), incorporates provisions found in both the act of 1875 and that of 1880, but we do not perceive that it affords any light upon the point here considered.

We are of opinion, therefore, that the act of 1875 was not repealed by the act of 1880, and that the court had jurisdiction to make the order in question.

All concur, except RAPALLO and MILLER, JJ., absent.

Order affirmed.

In the Matter of RICHARD H. DISSOSWAY.

Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code, §§ 2554, 2555.

Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree. *Held*, that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (§ 8847, subd. 11).

(Argued January 16, 1883; decided January 23, 1883.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made December 4, 1882, the nature of which, as well as the material facts, are stated in the opinion.

Josiah Fletcher for appellant. The proceeding (being one to enforce a civil remedy as for a contempt) was brought under the Code of 1880, because begun May 9, 1881, and is a special

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proceeding. (*Ludlow v. Knox*, 7 Abb. [N. S.] 411; *Erie R'y Co. v. Ramsey*, 45 N. Y. 637; *Brinkley v. Brinkley*, 47 id. 40; *Carrington v. Florida R. R. Co.*, 52 id. 583; 4 Wait's Pr. 190; Code, § 2283; 2 R. S. 538-556, § 20.) The order was good as a *ca. sa.* (*Watson v. Nelson*, 69 N. Y. 536.)

H. B. Philbrook for respondent. An attachment for a contempt can only be issued to enforce a decree or order adjudging the payment of money where it appears that the particular fund is in the hands of the person so ordered to pay. (*Estate of Draper*, December, 1878; *Watson v. Nelson*, 69 N. Y. 536.) Section 2555 of the Code regulates the proceedings to be taken to enforce a surrogate's decree directing the payment of money and is, therefore, by the eleventh subdivision of section 3347, confirmed in its application to special proceeding, commenced on or after September 1, 1880. (*Estate of Charity Woodhouse Calvin Sur.*)

EARL, J. Some time prior to the 17th day of October, 1879, Emma Bartlett died leaving a last will and testament, in which one Hayward was named executor. It is to be inferred that that will was subsequently admitted to probate, in the Surrogate's Court of the city of New York, and Hayward applied for letters testamentary. Dissosway, the present respondent, with other creditors, filed objections in the Surrogate's Court to the qualifications of Hayward as executor, and those objections came on for hearing before the surrogate, and gave rise to considerable litigation, the result of which was that the surrogate made a decree on the 17th day of October, 1879, adjudging that letters testamentary should be issued to Hayward, and that Dissosway and the other objecting creditors should pay to him for his costs and disbursements in the proceedings several sums aggregating \$715.60. On the 9th day of May, 1881, the surrogate made an order requiring Dissosway and Weaver, one of the other objecting creditors against whom the decree was made, to show cause before him on the 19th day of May, 1881, why they, and each of them, should not be

punished, as for a contempt, for not complying with the decree requiring them to pay the sum of money above mentioned. That order was served upon Dissosway, and upon the return thereof a hearing was had, the result of which was an order by the surrogate that he "be and he hereby is directed to stand committed to the common jail of the county of New York, there to remain charged upon said contempt until said several sums, amounting to \$715.60, with lawful interest thereon, from said 17th day of October, 1879, shall be fully paid to said J. K. Hayward, unless he shall be sooner discharged by the court, and that a warrant may issue to carry this order into effect." A certified copy of this order was delivered to the sheriff and by virtue thereof he arrested Dissosway, and held him in custody. Thereafter Dissosway presented a petition to a judge of the Superior Court of the city of New York, praying for a writ of *habeas corpus* to be directed to the sheriff, commanding him to produce him before the judge at his chambers in the city of New York. In his petition he set forth the substance of the decree of the surrogate, made on the 17th of October, 1879, and he annexed a copy of the order by virtue of which the sheriff arrested him. He also alleged in his petition, that the decree of the surrogate of October 17 could be enforced by execution, and that no execution had been issued to collect the amount directed to be paid by the decree; and he claimed that the surrogate had no jurisdiction to adjudge him in contempt, and to order him to be imprisoned. Upon the hearing before the judge, he ordered Dissosway to be discharged from the custody of the sheriff, and from further imprisonment under the order of the surrogate. From that order Hayward appealed to the General Term of the Superior Court, and from affirmance there he has brought this appeal.

Section 2550 of the Code of Civil Procedure provides that "the final determination of the rights of the parties to a special proceeding in a Surrogate's Court is styled indifferently a final order or a decree." Therefore the decision made on the 17th of October, 1879, was a decree. Section 2554 provides that "a decree directing the payment of a sum of money into court, or

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to one or more parties, may be enforced by an execution against the property of the party directed to make the payment." Section 2555 provides that a decree of a Surrogate's Court directing the payment of money may be enforced by serving a certified copy thereof upon the party against whom it is rendered, and that if he refuses, or willfully neglects to obey it, by punishing him for a contempt of court, in the following cases: *First*. Where it cannot be enforced by execution as prescribed in the preceding section. *Second*. Where part of it cannot be enforced by execution. *Third*. Where an execution issued as prescribed in the preceding section to the sheriff of the surrogate's county has been returned by him wholly or partly unsatisfied. Therefore, where an execution can be issued against the property of one who is ordered by a decree of the surrogate to pay money to a party, such an execution must be issued and returned unsatisfied, in whole or in part, before proceedings for a contempt under section 2555 can be instituted, and until such an execution has been issued and returned unsatisfied, the surrogate has no jurisdiction to punish for contempt. It is alleged in the petition presented to the judge that no execution had been issued to collect the money required to be paid by the decree, and we must assume that the judge upon the hearing before him, in the absence of any proof or fact in the case to the contrary, found that fact to be true; and hence if the provisions of the Code are applicable to this case, the order discharging Dissosway was properly made, and there is no ground for this appeal. The proceedings to punish Dissosway for contempt were commenced by the order to show cause made on the 9th day of May, 1881. This was not a continuation of the original proceedings, but was a special proceeding, and hence under section 3347, subdivision 11, the Code is specially applicable to it.

It, therefore, seems clear that the decision of the judge was right, and the decision of the General Term affirming it should be affirmed by this court, with costs.

All concur.

Order affirmed.

Opinion of the Court, per EARL, J.

BANK OF ATTICA, Respondent, v. METROPOLITAN NATIONAL BANK
OF NEW YORK CITY, Appellant.

When a preference is claimed on the calendar of this court under the provision of the Code of Civil Procedure (§ 791, sub. 7), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party" (§ 798).

It is no excuse for a failure to procure the order that there was no term of the court at which a motion for the order could be made. Such a motion may be made on notice before any judge of the court, at his residence or office, or at any place which the judge on application of the moving party may name.

(Argued January 16, 1888 ; decided January 23, 1888.)

MOTION to strike cause from the preferred calendar and to place it in its proper order on the general calendar.

Robert Sewell for motion.

Edward C. James opposed.

EARL, J. Section 791 of the Code of Civil Procedure provides for preferences in the trial or hearing of causes, and among those entitled to preference upon the calendar in all courts are actions mentioned in subdivision 7 of that section, to-wit: "An action against a corporation or joint-stock association issuing bank notes, or any kind of paper credits to circulate as money." Plaintiff, claiming a preference upon our calendar under this provision, caused this cause to be placed upon the calendar as a preferred cause; and this motion is made to strike it from the preferred calendar and place it in its proper order upon the general calendar.

Section 793 provides that, "when the right to a preference depends upon facts which do not appear in the pleadings or

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other papers, upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served, with or before the notice of trial or argument." In this case it does not appear in the pleadings, or other papers upon which the cause is to be heard in this court, that the defendant is a corporation issuing bank notes, or any kind of paper credits to circulate as money, and hence, in order to be entitled to the preference, the attorney for the plaintiff should have procured and served the order specified in the section. This he did not do, and for that reason the counsel for the appellant denies the plaintiff's right to the preference claimed. The answer to this on the part of the plaintiff is, that he had no opportunity to procure such an order, as there was no term of the court at which the motion could be made before the date fixed by the order of this court for serving notice of argument. But there was abundant time to make a motion before a judge. Such a motion upon notice could have been made before any judge of this court. The motion could have been noticed for the residence of the judge, or his office, if he has one, or for any place which the judge, upon the application of the moving party, might name as the place where he would hear the motion. Hence, there is no proper excuse given for not procuring the order required, and the plaintiff is not entitled to a preference.

We are now asked to make an order *nunc pro tunc*, giving the preference. As there does not appear in this case to be any good reason why this particular cause should have a preference over other causes upon the calendar, we are disposed to hold the plaintiff to strict practice and deny the order.

The motion should, therefore, be granted, with \$10 costs.

All concur.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
MICHAEL E. MCGLOIN, Appellant.

Upon the trial of an indictment for murder, a statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he (the officer) was an inspector of police, and had been watching him (the prisoner), since the shooting and saw him, in company with a man named Healey try to steal a barrel of whisky the night before, also told him about his pledging a pistol with which the murder was supposed to have been committed; the prisoner thereupon said he would make a statement, a coroner was sent for, who came to police head-quarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk to take down and prove the confession. *Held*, that the evidence did not disclose any threats, and did not authorize an inference that the confession was made under the influence of fear; that assuming the paper was sworn to by the accused it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Criminal Procedure (§ 895).

The provisions of said Code regulating the mode of taking and authenticating the statements of prisoners accused of a crime (§§ 188-200) refer only to the judicial examinations therein provided for, regularly instituted before a magistrate authorized to conduct such an examination (§ 147); they do not include a statement made in the manner of the one in question.

As to whether the provision of the said Code (§ 537, as amended in 1882, chap. 360, Laws of 1882), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære*.

The provision of the Revised Statutes (2 R. S. 701, § 28), rendering a person "sentenced upon a conviction for felony" incompetent to testify as a witness was repealed by the provision of the Code of Civil Procedure (§ 882), declaring that a person "convicted of crime or misdemeanor is notwithstanding a competent witness in a civil or criminal action," etc., and a person convicted and sentenced is competent as well as one convicted only.

It appeared that the deceased prior to his death lived with his family in rooms over a bar-room and restaurant kept by him; that being disturbed in the night time by a noise in the room below, he got up and started to go down stairs to ascertain its cause, and while upon the stairs was shot by some person standing in the door between the hall and bar-room at the foot of the stairs who was engaged in the commission of a burglary; that in the evening prior to the murder the prisoner redeemed a pistol

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which was in pawn, and took it away, which he again pawned the morning after the murder. The pistol was found through the admission contained in the confession, and the prisoner acknowledged that it was the pistol with which the deceased was shot. He also admitted to a witness that the morning after the murder he was on the street where the crime was committed the night before, and said "a man ain't a tough until he knocks his man out." *Held*, that there was sufficient evidence aside from the confession to meet the requirements of said provision authorizing proof of a confession, *i. e.*, that to warrant a conviction "additional proof that the crime charged has been committed" shall be given.

(Argued January 17, 1883; decided January 30, 1883.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 27, 1882, which affirmed a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of murder in the first degree. (Reported below, 28 Hun, 150.)

The material facts are stated in the opinion.

William F. Howe for appellant. The admission in evidence of the sworn statement of the prisoner, it not being a voluntary one, and he being under duress and in the power of an official who had done all that was necessary to arouse his fears, was error. (1 Greenl. on Ev., § 220; *People v. McMahon*, 15 N. Y. 384, 385, 386, 395; *Comm. v. Knapp*, 9 Pick. 496; *Jeffards v. People*, 5 Park. 522; *Price v. State*, 18 Ohio, 418; *U. S. v. Mott*, 1 McLean, 501; *People v. McMahon*, 15 N. Y. 386; 1 Greenl. on Ev. [13th ed.], § 219, p. 256; 1 Phil. on Ev. 401; 2 East's P. C. 659; *People v. Bates*, 11 Cox's Crim. Cases, 686; *People v. McMahon*, 15 N. Y. 385; *People v. Phillips*, 42 id. 200; Roscoe's Crim. Ev. 39; *Jeffards v. People*, 15 Park. Cr. 547; *Comm. v. Cullen*, 111 Mass. 435; *Comm. v. Morey*, 1 Gray, 461; *People v. Wentz*, 37 N. Y. 303; *Cox v. People*, 19 Hun, 430; 80 N. Y. 500; 1 Starkie's Ev. [ed. 1824] 49; *United States v. Chapman*, 4 Am. Law Jour. 440.) The rule respecting the admission of extra-judicial confessions is not at all changed

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by section 395 of the Code of Criminal Procedure so far as it relates to the objection that the confession was obtained by threats or fear. (1 Greenleaf on Evidence, §§ 219, 220; *People v. Wentz*, 37 N.Y. 308; *Cox v. People*, 80 id. 500; *S. C.*, 19 Hun, 430; *Balbo v. People*, 80 N.Y. 484.) When a confession is once improperly obtained, the influence is presumed to continue to another confession of the same or like facts. (*U. S. v. Chapman*, 4 Am. Law Jour. 440; *Cox v. People*, 19 Hun, 437.) The deposition or confession should not have been received, because the prisoner was sworn. (Code of Crim. Pro., § 198; 1 Greenl. on Ev., § 225; Bull. N. P. 242; Hawk. P. C. B., chap. 46, § 3; *People v. Hendrickson*, 1 Park. Cr. 396; *Hendrickson's Case*, 1 Park. 414; 10 N. Y. 13, 32-45; *People v. McMahon*, 15 id. 384, 391; *Teachout v. People*, 41 id. 7; *Hunter v. Le Conte*, 6 Car. 728; *People v. Rensselaer Com. Pleas*, 6 Wend. 543; *Merritt v. Gumaer*, 2 Cow. 552.) In taking the prisoner's statement the statute was not complied with. (Code of Crim. Pro., §§ 196, 198, 199, 200; *People v. McMahon*, 15 N. Y. 397.) The investigation before the coroner is to ascertain, in addition to other things, "whether a crime has been committed," and further, who is guilty thereof. (Code of Crim. Pro., §§ 773, 777, 780.) A confession of a defendant is not sufficient to warrant his conviction without additional proof that the crime charged has been committed. (Code of Crim. Pro., § 395.) A person sentenced upon conviction for a felony, is incompetent as a witness. (Code of Civ. Pro., § 832; 3 R. S. [6th ed. Banks] 994, § 43.)

John Vincent for respondent. The jury were justified, under all the circumstances surrounding the case, in finding premeditation and deliberation. (1 Greenleaf [7th ed.], § 18; *Comm. v. York*, 9 Metc. 93; *Comm. v. Webster*, 5 Cush.; *Van Pelt v. McGraw*, 4 Comst. 110, 114; Burrill on Circumstantial Evidence, 49; *Leighton v. People*, 10 Abb. N. C. 261, 269; *Sindrum v. People*, 88 N. Y. 196.) The voluntary confession of the defendant was correctly admitted as evidence in the case by express authority of law, unless it was made under the in-

fluence of fear produced by threats. (Code of Criminal Procedure, § 395 ; *Cox v. People*, 80 N. Y. 515 ; *Willet v. People*, 27 Hun, 469.) To establish the incompetence of the witness Banfield, it was, therefore, essential that the record of a conviction should be produced, and the facts developed by his cross-examination could only be used for the purpose of affecting the weight of his testimony before the jury. (Code of Civil Procedure, § 832 ; *Perry v. People*, 86 N. Y. 353.) Where the court has already charged the substance of a request to charge, it is proper to refuse it. (*O'Connell v. People*, 87 N. Y. 381 ; *Walker v. People*, 88 id. 89.)

RUGER, Ch. J. We should be quite content to rest our decision of this case upon the opinion delivered at General Term, were it not a matter affecting the existence of a human life, and, therefore, requiring the utmost care on the part of those having charge of the administration of the law, to see that no injustice be done to the accused. These considerations have seemed to require that we should express our views fully on the material questions presented by this record, and state the reasons for the conclusions arrived at. It appears by the record that the defendant, Michael E. McGloin, was indicted for murder in the first degree, in having caused the death of one Louis Hanier on the morning of the 30th day of December, 1881. The indictment contained two counts, the first charging that the murder was committed while the said McGloin was engaged, with others, in the commission of the crime of burglary and felony; and the second, that the said crime of murder was committed with a deliberate and premeditated design to effect the death of said Louis Hanier. Upon the trial of this indictment, at a Court of General Sessions in the city of New York, a statement, proved to have been made and signed by the defendant, was offered in evidence, on behalf of the people, against him. It was objected by the counsel for the defendant that this statement was inadmissible, for substantially the following reasons:

First. That it was made by the defendant under the influ-

ence of fear, produced by threats made to him by the officer in whose custody he then was upon a charge of committing the crime in question.

Second. Because it was taken before a magistrate after defendant was accused of, and under arrest for, the perpetration of a crime; but was not taken and authenticated in accordance with the requirements of sections 198 and 199 of the Code of Criminal Procedure.

Third. That it was not voluntarily made, being a sworn deposition. The first objection proceeded upon the assumption that the officer effecting the arrest had threatened the prisoner, and that such threats had produced an emotion of fear in the mind, probably affecting the character of his confession. If this assumption is well founded, it will be fatal to the admissibility of the evidence, and also to the conviction, in part founded thereon. The facts upon which this ground of objection rests are as follows: Upon making the arrest, the officer informed McGloin that he "was charged with shooting Louis Hanier;" that he (the officer) was inspector of police, and "had been watching him" (the prisoner) "since the shooting, and saw him in company with a man named Healey, and saw him try to steal a barrel of whisky the night before I arrested him. I also told him about the pledging of the pistol" (referring to the pawning by McGloin, the day after the murder, of a pistol with which the crime was supposed to have been perpetrated). "McGloin said he would make a statement. I said to him, I would send for Coroner Herman to take it." The coroner was then sent for and came to police head-quarters, where the defendant was in custody, and the confession in question was made, the coroner not acting in any official capacity, but as a mere clerk to take down and prove the confession. This was substantially all that occurred between the officer and the defendant previous to the making of the statement. We fail to see, in this conversation, the existence of any threats, or any proof from which it could be inferred that the defendant made the statement under the influence of fear.

It was held by this court in the case of *The People v. Wentz*

(37 N. Y. 303), where the defendant was in custody upon a charge of arson, that a confession drawn out by questions, and preceded by the statement made by the officer to the prisoner, "that he was in a bad fix, and had got caught at last," was "wholly voluntary, and made uninfluenced by any threat, menace, promise, or other influence."

The case of *Cox v. The People* (80 N. Y. 500), although a capital case, was, in respect to the inducements held out to the prisoner, similar to the *Wentz Case*. A confession there made by the defendant was held admissible. The court further held that it was "not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answers to questions put by him." No material circumstance appears in the case at bar, which did not appear in the cases referred to, except that here the officer stated to the prisoner that he was aware of an attempt on the part of the prisoner, the night before his arrest, to steal a barrel of whisky. It would be unreasonable to say that the defendant was moved to make this confession by fear of his exposure and punishment for the comparatively trivial crime of stealing, when he stood uninfluenced by the fact that he was in custody charged with the commission of a crime for which his life then stood in jeopardy. The argument in short is that the defendant might be improperly influenced to confess the commission of the crime of murder, through fear that he might be exposed and prosecuted for the crime of stealing whisky. There is little, if any, force in it.

The question upon which the second ground of objection was based, prior to the adoption of the Code of Criminal Procedure, was the subject of some controversy and difference in the courts. (*Hendrickson v. People*, 10 N. Y. 28; *People v. McMahon*, 15 id. 385; *People v. Wentz*, *supra*; *Teachout v. People*, 41 N. Y. 7.) The difficulty in brief seemed to be in determining whether the reason for the objection rested upon the theory that the evidence was given in obedience to the requirements of a subpoena, and was, therefore, compulsory and objectionable, as requiring a prisoner to give

evidence which might criminate himself, or whether it was based upon the presumption that a prisoner giving evidence in relation to a crime, with the commission of which he is charged or suspected, gives it under such influences as produce an apprehension of danger and a mental disturbance, rendering it unjust to hold him responsible for what he says while subjected to such influences. It was said that such evidence is not voluntary, because the mind being confused and agitated by the apprehension of danger, cannot reason with coolness, and will naturally resort to falsehood to escape the consequences of the impending danger. (*Hendrickson v. People, supra*; *People v. McMahon, supra*.)

The effect of these differences was to cause the line which distinguished admissible from objectionable confessions to fluctuate according to the theory which was followed, and deprived the law of that certainty, and prisoners accused of crime of that uniformity of protection, which is so essential to justice. Without discussing or referring to the authorities on this subject at length, it may be said that the following propositions were, prior to the adoption of the Criminal Code, well settled by law in this State: *First*. That all confessions material to the issue, voluntarily made by a party, whether oral or written, and however authenticated, were admissible as evidence against him on a trial for a criminal offense. (*People v. Wentz, supra*.)

Second. It was no objection to the admissibility of such confessions, that they had been taken under oath from a person attending before a coroner, in obedience to a subpoena, upon an inquiry conducted pursuant to law, into the causes of a homicide. (*Hendrickson v. People, supra*; *Teachout v. People, supra*.)

Third. That the confession or declaration sought to be given in evidence was in writing and purported to be sworn to was no objection to its admissibility, unless it also appeared that it was taken before a magistrate upon a judicial investigation against the person accused of the commission of the crime.

PARKER, J., in *Hendrickson v. People (supra)* said in relation to the objection that a confession was not taken con-

formable to the statute, "but neither is the statute, nor were the common-law rules, of which it is declaratory, applicable to any examination, except that of a person brought before a magistrate on a charge of crime. All other examinations are classified as extra-judicial."

The provisions of the Code of Criminal Procedure regulating the mode of taking and authenticating the statements of prisoners accused of crime, contained in sections 188 to 200 inclusive, refer in terms only to the judicial examinations therein provided for, regularly instituted before one of the magistrates described in section 147, for the examination of criminals. A coroner is not one of these magistrates. There is no direct evidence in the case that the paper offered was sworn to by the defendant. Such fact is sought to be inferred from the fact that in the body of the paper this clause is inserted: "The above is a true statement in every respect, to which I swear, and I make the same of my own free will;" and also because it purports to have been "taken" before the coroner and is subscribed by him. These facts furnish very uncertain evidence that the defendant was sworn to such statement. The only witness who was called upon to testify on this subject was officer Byrnes, and he testifies positively that the defendant was not sworn by the coroner. But assuming that this paper was sworn to by McGloin, we must, within the authorities in this State, come to the conclusion that it was in no respect a compulsory statement, and was at common law admissible in evidence as against him on his trial.

The Code of Criminal Procedure went into effect in September, 1881, and contained the following provision: "Section 395. A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but it is not sufficient to warrant his conviction without additional proof that the crime charged has been committed." The crime in this case was committed after the Code

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took effect and is, therefore, governed by its provisions. The admissibility of the evidence in controversy, under this statute, there being no proof that the same was made either under the "influence of fear produced by threats," or upon the stipulation referred to in the act, is beyond question. It is thus found that neither at common law, nor by the statute, was this evidence open to any of the grounds of objection raised.

One Frederick Banfield was called as a witness by the people on the trial, and gave material evidence against the defendant. Upon cross-examination, he testified that he had been arrested and convicted of the crime of grand larceny, and that he had been sent to the State prison for the period of eighteen months. That he was also convicted of the crime of burglary, and sentenced therefor, in a Court of General Sessions, to the penitentiary for the term of three and one-half years. No objection was taken to this testimony, neither was a motion made to strike it out on the trial. The question as to the competency of Banfield, as far as can be seen from the record, was first raised at the General Term. If the question had been raised upon the trial, *non constat* but that the people might have shown a pardon, and thus restored the competency of the witness.

It was contended on the argument by the appellant's counsel, that by virtue of section 527 of the Code of Criminal Procedure, this court had power to order a new trial when the verdict was against the weight of evidence, or against law, or when justice required it to be done "whether any exceptions shall have been taken or not in the court below." It is quite doubtful whether that provision applies to this court, but without considering that question we are clearly of the opinion that the objection now raised to his competency is not tenable even if we were at liberty to review it.

It is claimed that Banfield was rendered incompetent to testify as a witness in the case, by virtue of the provisions of the Revised Statutes (vol. 3 [Banks' 6th ed.], 994, § 43, tit. 7), the essential portions of which read as follows: "No person sentenced upon a conviction for felony shall be competent to

testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or by the legislature, except in the cases specially provided by law."

It is claimed that section 832 of the Code of Civil Procedure, which was in force at the time of the commission of this crime, and which reads as follows: "A person who has been convicted of a crime or misdemeanor, is notwithstanding a competent witness in a civil or criminal action, or special proceeding, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer to such a question," does not restore the competency of the witness, because the disqualification imposed by the foregoing section of the Revised Statutes follows only upon a "sentence based upon a conviction for a felony," whereas the subsequent enabling statute, embodied in section 832 of the Code of Civil Procedure, relieves only those who have been disqualified by a conviction of a crime or misdemeanor, leaving, as it is claimed, those who have been tried, convicted and sentenced, still subject to the exclusion pronounced by the Revised Statutes. It is hardly conceivable that this construction can be seriously urged. Both at common law and by statute a witness becomes disqualified, only after sentence rendered upon a conviction for felony. (*People v. Whipple*, 9 Cow. 707; *People v. Herrick*, 13 Johns. 82.) When it is considered that a mere conviction, not followed by a sentence, never worked a disability, it will be seen that the construction contended for by the plaintiff in error would deprive section 832 of the Code of Civil Procedure, as well as section 714 of the Penal Code, of any meaning or effect whatsoever.

One of the most familiar rules for the construction of statutes requires not only that some effect should be given to all acts of the legislature, if capable of such interpretation, but that effect must be given, if possible, to all of the language employed. (*Matter of New York & Brooklyn Bridge*, 72 N. Y. 527.)

The language used in section 832 to describe the object intended to be accomplished is that which has obtained invariable usage, not only in the reports, but with text-writers, and is there used according to the signification given to it by legal writers. It was, therefore, "an accurate legal description of such a disqualification to say that it is produced by a conviction of a felony. It is the depravity of nature evidenced by the conviction that creates the disability, and is the only cause of that disability. "It is the infamy of the crime, and not the nature of the punishment, which destroys competency." (1 Wharton's Criminal Law, § 760.)

While the terms "disqualified by a sentence for crime," or similar words, are never found in the text-book or reports, the language used in section 832 is invariably employed to describe the disability referred to. (*Jackson v. Osborn*, 2 Wend. 555; 13 Johns. 82, *supra*; *Hilts v. Colvin*, 14 id. 182.)

The disqualification, though entirely based upon the conviction, yet in order to preclude the possibility that the conviction may have been nullified by a motion in arrest, or other proceeding, is by the Revised Statutes required to be followed by a sentence in order to become effectual. There is not one disqualification produced by a conviction, and another by a sentence, but both conviction and sentence together produce one and the same disqualification. The removal of the cause of disqualification necessarily restores the competency of the witness, without reference to the fact as to whether he was sentenced or not. It was evidently the intention of the legislature to remove the disqualification in question, and it is our duty in construing this statute to give effect to that intention.

From the irreconcilable repugnancy which exists between these acts, the inference inevitably follows, that the provisions of the Revised Statutes were intended to be repealed by the enactment of the Code of Civil Procedure. We are, therefore, of opinion that no reason exists for granting a new trial upon this ground.

Notwithstanding the admission of the confession of McGloin in evidence against him, it is still required by section 395 of

the Code of Criminal Procedure, in order to warrant his conviction, "that additional proof that the crime charged has been committed," should be given. Without undertaking to state the evidence in detail, it will be sufficient to refer to the several prominent facts which the evidence, outside of the admissions contained in his confession, either proved or tended to prove. The proof showed that previous to his murder, one Louis Hanier lived in a two story frame dwelling on West Twenty-sixth street in the city of New York; that the lower part was used for a bar-room and restaurant, with a hall adjoining; and the upper part was occupied as a dwelling by said Hanier with his family, and communicated with the lower part of the house by a stair-way running into the hall, and from the hall by a door-way opening into the bar-room; there were two modes of entrance into the house, one from the street by a door-way opening into the bar-room, and another by a door opening into the hall. On the morning of the 30th day of December, 1881, about the hour of two o'clock, Louis Hanier, standing on the stair-way leading from the upper to the lower stories of said house, and being at the time about three steps from the top of the stair-way, was fatally shot by a pistol or revolver in the hands of some person standing in the door-way, between the bar-room and the hall, at the foot of the stair-way; that said Hanier died about three minutes after the shooting, in consequence of the wound thereby occasioned. It was in proof that Hanier closed and locked up his saloon about the hour of one o'clock and had retired to rest. That he was awakened by his wife, who heard a noise in the saloon below, and started in his night-shirt to investigate the cause of the noise, when he was shot as described. It was testified by a policeman, that after Hanier had closed up his saloon and retired, he (the policeman) tried the front doors of the house and found them both securely fastened. It was further shown that there was a back door to the saloon, opening into a back yard, which they were accustomed to fasten at night on closing up the saloon. It was

also shown that immediately after the shooting, the front door of the saloon was found open.

About eleven o'clock, P. M., of the night of the homicide, the defendant, Michael E. McGloin, redeemed a pistol which he had in pawn with one Gooley on West Thirteenth street, then supposed to be loaded, and took it away with him; that said McGloin, sometime on the morning of the 30th day of December, 1882, in company with several other persons, left a package containing a revolver with one Charles R. Graves, who keeps a saloon on West Fifty-seventh street in New York, and asked him to keep the same for him; that on the morning of the said 30th day of December, McGloin again obtained said pistol, and at about eleven o'clock, A. M., of that day, pledged it for a small loan with one Bernard Rosenthal, who keeps a pawnbroker shop at No. 862 Ninth avenue in New York city. This pistol was found through the admissions contained in McGloin's confession, and was acknowledged by McGloin to be the pistol with which Louis Hanier was shot.

It was further proved by Frederick Banfield that he saw McGloin about half-past ten o'clock of the morning of said 30th of December, and had the following conversation with him: "I asked him," says Banfield, "if on the night before, he was out. He said, 'yes.' I told him there was a man killed around Twenty-sixth street. I asked him if he was around Twenty-sixth street the night before. He said, 'yes,' Then he said to me, 'a man aint a tough until he knocks his man out.'" This evidence, we think, not only tended to prove, aside from McGloin's confession, that a burglary was committed upon the dwelling of Louis Hanier on the morning of the 30th of December, 1881, but also tended to establish the fact that Louis Hanier was unlawfully killed in the course of the commission of such burglary, and that the defendant was a principal in the commission of both such crimes. We are, therefore, of the opinion that there was sufficient corroboration of the confession of the defendant, McGloin, to warrant his conviction of the crime of murder in the first degree. The confession of the defendant also tends to prove not only his active participa-

tion in the commission of the burglary, but the fact that he fired the shot which killed Louis Hanier.

If we consider the confession in connection with the other proofs given on the trial, it tends to establish the fact that the crime in question was committed under circumstances of great atrocity, indicating on the part of the perpetrator a wanton and reckless disposition and a depraved and dangerous character; they together unquestionably furnished sufficient evidence to justify a jury in finding the defendant guilty of the murder of Louis Hanier under both counts of the indictment.

The conclusions at which we have arrived, as to the competency of the evidence objected to, as well as the legal effect of all the evidence in the case, render it unnecessary to examine at length the several exceptions taken to the charge of the recorder by the counsel for the plaintiff in error. Three exceptions are brought to our attention by the brief of the counsel. The first is an exception to the refusal of the recorder to charge as follows: "That in order to convict under the first count of the indictment, the jury must be satisfied beyond reasonable doubt, *first*, a burglary or larceny was committed by the prisoner; *second*, that while so engaged in the commission of either or both of said offenses, the prisoner killed the deceased. Before the jury can consider the proposition as to the killing whilst in the perpetration of a felony, they must find that there was evidence exclusive of the confession of the prisoner, that the felony had been committed; that the prisoner's alleged confession is not sufficient to warrant the jury in finding affirmatively that the offense of burglary or grand larceny, or both of said offenses, had been committed, without additional proof on the subject." If there were any erroneous propositions included in this complex request, the refusal to charge as requested was properly made. It will be seen by the first clause of the request, that the recorder is asked to charge the jury, that they cannot find the defendant guilty of any crime thereunder, unless they also find the existence of the several elements constituting the crime of murder in the first degree. In other words, that no conviction could be had

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under said count, except for murder in the first degree. In fact it was competent for the jury to convict the prisoner of the crime of manslaughter, or any inferior degree under that count, and without reference to the truth or existence of several of the facts described in the request. The second clause of such request is based upon the alleged inadmissibility of the confession of McGloin. As we have seen, that assumption was incorrect, and this part of the request was, therefore, erroneous. The last clause of this request was actually charged by the recorder immediately after the refusal to charge above referred to. The exception to the refusal to charge as requested was, therefore, not well taken.

The exceptions to the refusal of the court to charge the jury as matter of law, upon the evidence, that they could not convict the prisoner of murder in the first degree under the first count of the indictment, and also the exception to the refusal of the court to charge the same with reference to the second count, were neither of them well taken, inasmuch as we have held the evidence to be sufficient to justify the jury in finding the defendant guilty under both counts. Upon the whole case we are satisfied that the verdict was neither against the evidence, or against law, that the trial was conducted in substantial conformity with the rules of law, and that the result was such as the jury might properly reach upon the evidence. We do not think that justice requires a new trial, but on the contrary that it leads us to an affirmance of this conviction.

The judgment should, therefore, be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

In the Matter of the Probate of the Last Will and Testament of
CHARLOTTE A. PEPOON.

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119 617

Where the attestation clause to a will is full and complete, it is not always essential that all the particulars required by the statute to constitute a

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valid execution of the instrument should be expressly proved. The presumption is in favor of due execution, and a failure of recollection on the part of the subscribing witnesses will not defeat the probate where the surrounding circumstances, taken together with the attestation clause, satisfactorily establish such execution.

The witnesses to a will, the attestation clause to which was in due form, and which was executed more than fourteen years before the death of the testatrix, testified in substance that they had not a clear recollection of what occurred at the time of the execution, that they must have read or heard read and understood the purport of the attestation clause, as they never signed any document without knowing its contents, and that they would not have signed if the facts stated in said clause had not occurred, one of them also testified that the signatures of the testatrix and the two witnesses were made in the presence of each other, and that he recollected that said clause was read or that he heard it read. *Held*, that the evidence justified the admission of the will to probate.

(Argued January 19, 1883; decided January 30, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made February 3, 1882, which affirmed a decree of the surrogate of the county of New York, admitting to probate the will of Charlotte A. Pepoon, deceased.

The material facts are stated in the opinion.

Jno. E. Parsons for appellant. In the absence of proof of a declaration to the witnesses that the instrument is a will, probate should be refused even though it appears by the fact of the execution of the paper that the testatrix may have had a purpose to dispose of her property in the manner indicated. (*Buller v. Benson*, 1 Barb. 526; *Kingsley v. Blanchard*, 66 id. 317; *Tyler v. Mapes*, 19 id. 448; *Seymour v. Van Wyck*, 6 N. Y. 120; *Sisters of Charity v. Kelly*, 67 id. 409.) In the absence of any recollection by the witnesses that there was the required declaration, the case stands upon the inferences to be drawn from the attestation clause and any corroborating circumstances on the one side, and the attending and conceded circumstances on the other. (*Orser v. Orser*, 24 N. Y. 51; *Peck v. Cary*, 27 id. 9; *Will of Graham*, 2 Bradf. 226; *Lawrence v. Norton*, 45 Barb. 448; *Matter of Kellum*, 52 N. Y.

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517.) Conjectures and inferences drawn from the fact of the attestation clause were inadmissible in the absence of recollection by the witnesses that they did read the attestation clause and were of no value. (*Brown v. Cady*, 19 Wend. 477; *Greenleaf on Ev.*, § 440; *Newell v. Doty*, 33 N. Y. 83, 94; *Butler v. Benso*, 1 Barb. 526; *Morehouse v. Matthews*, 2 N. Y. 514.)

Wheeler H. Peckham for respondents. The will being some fifteen years old, and the testatrix having lived nearly fifteen years after its execution, every presumption is in favor of its due execution. (*Butler v. Benson*, 1 Barb. 526, 538; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 60; *Nelson v. Giffert*, 3 id. 158; *Peck v. Cary*, 27 N. Y. 9, 32, 33; *Cheney v. Arnold*, 18 Barb. 438; *Willis v. Mott*, 36 N. Y. 486; *Matter of Will of Kellum*, 52 id. 517, 521; *Rugg v. Rugg*, 83 id. 592; 1 *Williams on Executors* [6th Am. ed.], 103, 104 [bot. p.] note *w.*) Of the case as a question of fact upon the weight of evidence, this court has no jurisdiction. (*In re Ross*, 87 N. Y. 514; *Davis v. Clark*, id. 623.) The testimony from recollection thus proves the signing at the end of the will; the signing in the presence of each of the two witnesses, and that the witnesses became such at the request of the testatrix. (*Dayton on Surrogates*, 110, 114.) A memorandum made at the time of a transaction, by a witness thereof, and which a witness can say was then truly made, is itself evidence, though • the witness at the time of testifying cannot remember the transaction, and though examination of the memorandum fails to refresh his memory. (*Butler v. Benson*, 1 Barb. 526; *Halsey v. Sinsebaugh*, 15 N. Y. 485, 488; *Howard v. McDonough*, 77 id. 593.) Proof of a will abides by the same rules of evidence which prevail in all other judicial investigations. (*Peebles v. Case*, 2 Bradf. 226.)

MILLER, J. The will of the testatrix contained the usual attesting clause, in due form, and was subscribed by the signatures of two attesting witnesses. It comprehended all that was required by law, and upon its face the will bore every ap-

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pearance of having been lawfully executed. It was dated the 20th of July, 1866, and was executed not long after that. The testatrix died in November, 1880. Considerable time had, therefore, elapsed between the making of the will and the death of the testatrix. There is no doubt as to the testatrix's capacity, and the question is, whether the proofs before the surrogate established that the will had been executed in accordance with the provisions of the Revised Statutes.

The two witnesses to the will, who were sworn before the surrogate, did not, by their evidence, fully establish that the statutory requirements were complied with, yet, with the attestation clause, which fully complied with the statute, it was sufficient to establish the will. The time which had elapsed since the execution of the will was so long, it is by no means remarkable that the recollection of the witnesses should have become somewhat faint and obscure, by reason thereof, and hence it is not always essential, where the attestation clause is full and complete, that every particular should be proved.

The first of the subscribing witnesses, Mr. Roberts, was an employee in the Second National Bank, the place at which the testatrix executed the will in question. He testified he had no clear recollection of the circumstances; that he had a vague impression of her being in the bank, one day, and of her signing and his witnessing the will. He did not remember what occurred at the time, and could only infer that he read the attestation clause; that he thought he knew, at the time, what was necessary to the proper execution of a will. He also stated, in answer to a question put, that he must have understood the purport of the attestation clause, and was sure of that from his habit of not signing any document, without first reading it. He testified that if the matters stated in the attestation clause had not occurred, he would not have signed it. Upon cross-examination he testified he had no recollection of reading the attestation clause. Upon re-direct-examination, after examining the attestation clause, he swore, that he should say, Mrs. Pepoon signed, published and declared the will as and for her last will and testament, in the presence of himself and Mr.

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Bronson, and that they subscribed their names to it as witnesses, at her request and in her presence, and that he has no doubt it was in the presence of each other. He subsequently stated that he meant by the above only to give the deduction from what he had signed, but had no recollection that he ever knew what she said there, and that he could not say that he recollected any of these circumstances. Although somewhat indefinite, there was some evidence by the witness to establish the fact that the forms of law had been complied with.

The other witness, Mr. Bronson, testified to the will being signed by the testatrix, and then by Mr. Roberts and himself. Reading the attestation clause he says, "she must have declared it to be her will and her signature," but he does not recollect that she said any thing more. He further testified to having no recollection of being requested to sign as a witness, but says "he must have read that clause when he signed it, or heard it read, because he never signed any thing, without knowing what he signed;" he further says, he must have signed at the request of Mrs. Pepoon. He also swears that he would not have signed it, without reading that part over his signature, and further that he would not have signed it, unless these things had been so, after he had read it. He testified to the signatures of the testatrix, Mr. Roberts and himself, and said they were all signed in the presence of each other. On cross-examination he makes his testimony still stronger, and says: "I am sure that before signing my name as a witness, I read the attestation clause; I should say that I state that from recollection; I know that to be my signature, and I must have read it before I signed it; I do not think that is all inference; I mean to state now that I now recollect that I did read that, or that there was read to me that clause."

Every presumption is in favor of the due execution of the will in question. The rule is well established that, when there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attesting clause and the surrounding circumstances satisfactorily establish its execution. (*Rugg v. Rugg*, 83 N. Y. 592; *Matter of Kellum*,

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52 id. 517.) Within this rule it is difficult to see why the will in question was not sufficiently proved. Although the witnesses may not have established a case strictly within the requirements of law, yet their testimony strongly tended to sustain the validity of the execution of the will, and the attestation clause being perfect it is not apparent how it can properly be claimed that the will was not sufficiently proved. If the witnesses had been dead it could have been proved according to the provisions of the statutes of this State. The proof given established a stronger case than could have been made out if the witnesses were not living. Under such circumstances it would be going very far to hold that the will was not lawfully proved, and no reported case would uphold such a decision. We agree with the learned counsel for the appellant that probate of a will should be refused when the circumstances establish that there was not the required declaration, yet we think the circumstances here are in the contrary direction and tend to show that there was such a declaration as the law requires, and within none of the cases which have been cited, all of which we have carefully examined, do we find the declaration of the testatrix here was not sufficiently and properly established. It cannot, we think, be fairly contended in this case from the evidence, that there is such an entire absence of recollection by the witnesses that there was the required declaration, for there is at least some evidence tending in that direction. But even if such was the case, we think that within the rule which we have stated the probate of the will should not be defeated, as the surrounding circumstances all tend to show its valid execution; the will was signed by the testatrix and by the subscribing witnesses, and was evidently intended as a legal and valid declaration of the intention of the testatrix. It was prepared with a proper attestation clause and executed for the purpose of disposing of her estate, and hence, is brought within the principle decided in *Rugg v. Rugg* (*supra*). Nor can it be contended we think that the facts and circumstances establish that the testatrix did not declare the instrument to be her will, and it is to be assumed, from the proof in the case,

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that the will was executed by the testatrix, that it was attested by witnesses, that it contained an attesting clause containing all the essentials to make it a valid will, and from the other evidence tending to show that it was declared to be such, that no such declaration was made. The evidence presented establishes to the contrary. We think there is nothing in the testimony from which it may be fairly inferred that the witnesses were not aware, at the time of the execution of the will, that they were signing it as such witnesses.

We do not deem it necessary to discuss the testimony at length in regard to the question whether the declaration was made, as it sufficiently appears from the evidence, in connection with the attestation clause, that such was the fact.

Several questions are raised in regard to the admissibility of evidence which are sufficiently considered in the opinions of the surrogate and of the General Term, and do not require a discussion. We think there was no error in this respect.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

In the Matter of the Probate of the last Will and Testament
of EDWARD HEWITT, deceased.

91	261
124	450
124	465

A will was written upon the two sides of a piece of paper; the subscribing witnesses signed their names at the bottom of the first side and again at the top of the second side, following which was an important provision of the will. *Held*, that as one of the requisites prescribed by the statute for the formal execution of a will, i. e., that the attesting witnesses shall sign their names at the end thereof (2 R. S. 63, § 40, subd. 4), had not been complied with, probate of the instrument was properly denied; and that the refusal of the surrogate to hear proofs was not error.

(Argued January 22, 1883; decided January 30, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order

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made April 10, 1882, which affirmed a decree of the surrogate of the county of New York, refusing to admit to probate an instrument purporting to be the last will and testament of Edward Hewitt, deceased.

The facts are stated in the opinion.

Jesse K. Furlong for appellant. The absence of a date in a will, and the omission to name an executor can be supplied. (*Leaycraft v. Simmons*, 3 Bradf. 35.) So long as in point of time the witnesses wrote their names upon the will after the act of subscription had been done by the testator, it is immaterial where the names of the witnesses appear thereon. A substantial compliance with the statute is all that is required. (*Jackson v. Jackson*, 39 N. Y. 153; *Pick v. Cury*, 27 id. 9; *Gilbert v. Knox*, 52 id. 129; *Leaycraft v. Simmons*, 3 Bradf. 35; *Remsen v. Brinckerhoff*, 26 Wend. 331; *Hitchcock v. Thompson*, 6 Hun, 279; *Redfield's Law of Probate of Surrogate's Court* [2d ed.], 164.)

S. R. Ten Eyck for respondent. The failure of the subscribing witnesses to sign the paper, propounded as a will, at the end thereof, is fatal to its validity as a will. (3 R. S. 63 [Banks' 6th ed. 53].) All the requisites of the statute must be complied with in order to make a will. (*Sisters of Charity v. Kelly*, 67 N. Y. 409; *Baskin v. Baskin*, 36 id. 416; *Remsen v. Brinckerhoff*, 26 Wend. 331; *McGuire v. Kerr*, 2 Bradf. 214; *Lewis v. Lewis*, 11 N. Y. 220; *Gilbert v. Knox*, 52 id. 125; *In re Probate of Will of O'Neil*, 15 N. Y. Weekly Dig. 29.)

EARL, J. Edward Hewitt died in May, 1881, leaving an instrument purporting to be his will, which was executed a short time before his death. It was written on two sides of an irregular shaped piece of paper, about one-half of it upon one side and the other half upon the other side. The witnesses signed their names at the bottom of the first side and again at the top of the second side. The deceased signed his name at

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the end of the disposing portion of the instrument, near the middle of the second side, and again at the bottom of the second side. Thomas Hewitt, a brother of the deceased, presented a petition to the surrogate of New York, praying for probate of the instrument as a will. Upon that petition citations were issued, and on the return day of the citations the widow of the deceased filed objections to the probate of the instrument relating to the manner and form of its execution. The matter was then adjourned to the 22d day of June, 1881, and the counsel for the contestant then made a motion that probate of the instrument be denied, for the reason that the witnesses thereto had not signed their names at the end thereof. The counsel for the proponent claimed the right, then and there, to examine his witnesses and to give proof of certain facts stated by him; but the surrogate declined to hear any evidence on the part of the proponent, and made a decree denying probate of the instrument upon the ground that the attesting witnesses did not sign their names at the end thereof. The decree of the surrogate was affirmed upon appeal to the General Term of the Supreme Court, and then the proponent appealed to this court.

We are of opinion that probate of the instrument was properly denied. The statute (3 R. S. [7th ed.], § 2285) prescribes the formalities which shall attend the execution of a will, one of which is that it shall be subscribed by the testator at the end of the will; and another is that the attesting witnesses shall sign their names at the end of the will. However unimportant these formalities may be in any particular case, they must be substantially observed in order to make a valid will. None of them can be dispensed with. As said by the chief justice in the case of *Remsen v. Brinckerhoff* (26 Wend. 325), after stating the four requisites prescribed by the statute for the formal execution of wills: "It is obvious that every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another, and there must be a concurrence of all to give validity to the act, and that the omission of either is fatal." It is the requirement of the statute that both the

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testator and the witnesses must sign at the end of the will. Wherever the will ends there the signatures must be found, and one place cannot be the end for the purpose of subscribing by the testator and another place be the end for the purpose of signing by the witnesses. As was said by Judge FOLGER in *Sisters of Charity v. Kelly* (67 N. Y. 409), a case in which probate of a will was denied because the signature of the testator was not at the end of the will: "Can we say that the end of a will has been found until the last word of all the provisions of it has been reached? To say that where the name is there is the end of the will is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that where we find the name there is the end of the will. The instrument offered is to be scanned, to learn where is the end of it as a completed whole; and at the end thus found must the name of the testator be subscribed." If the name of the testator had been written where the names of the witnesses are found no one could properly claim that it was written at the end of the will. Here the signatures of the witnesses are followed by an important provision of the will, disposing of property to his brother. They are not written at the end of the will, but manifestly near the middle thereof, and hence plainly, from an inspection of the will, the statute was not complied with.

There was no error committed by the surrogate in refusing to hear the proofs offered on the part of the proponent. It would have been wholly unavailing to show that this will was in other respects properly executed; that there was some excuse for not placing the names of the witnesses at the end of the will; that there was the absence of fraud, and that the transaction was attended with entire good faith and fairness. The proof offered would not tend to show that the place where the signatures were signed was the end of the will. No proof could show that. That was a fact which could not be removed from the case by any evidence, and the requirement that the signatures should be at the end of the will could not be supplied by any evidence; and, hence, it was proper for the surrogate,

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upon the production of this instrument before him, to refuse to receive evidence and deny probate, just as he would have been authorized to do if the name of the testator, instead of being subscribed at the end of the will, had been simply written at its commencement.

We are, therefore, of opinion that the judgment of the Supreme Court should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

THE PEOPLE, ex rel. JOHN RYAN, Appellant, v. STEPHEN B. FRENCH et al., Commissioners, etc., Respondents.

A patrolman is an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (§ 43, chap. 335, Laws of 1873), is incidental to the office, to which, by reason of his title to the office, the incumbent acquires a right.

While, therefore, such officer may be removed for cause (§ 41), or retired from office for disability incurred in the performance of duty (§ 42), he is entitled to his entire salary as long as he possesses the title to the office.

The authority conferred by said charter (§§ 41, 50), upon the board of police, to provide by rules and regulations for the government of the police department and the discipline of the subordinates under its control, does not give a right to pass rules or regulations making deductions from the salary of a patrolman while detained from duty by reason of sickness or injury caused by the discharge of his official duty.

The provision, above mentioned, of said charter (§ 42), authorizing the retirement of a patrolman, was not repealed by the act of 1878 (Chap. 389, Laws of 1878), creating a police pension fund.

A continuous practice of the board to make such deductions, however general, cannot control the true construction of the law, or impair the right plainly given thereby.

It seems that the provision of the act of 1853 in relation to the police department (§ 8, art. 1, chap. 228, Laws of 1853), providing that policemen "absent from duty in consequence of disease, or injuries contracted in public service, shall receive full pay," has not been repealed.

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The history of legislation in reference to the police force of said city given and the various statutes collated.

People, ex rel. Ryan, v. French (24 Hun, 263), reversed.

(Argued March 13, 1882; decided April 11, 1882. Motion for reargument granted June 20, 1882. Reargued October 23, 1882; decided January 30, 1883.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 11, 1881, which affirmed an order of Special Term, denying the application of the relator for a peremptory *mandamus*, requiring defendants, as commissioners, composing the board of police of the police department of the city of New York, to pay to the relator a balance of salary alleged to be due to him as patrolman. (Reported below, 24 Hun, 263.)

The moving affidavits aver that on the 21st day of July, 1876, the relator, being a police officer, while assisting another officer in making an arrest, was assaulted by persons resisting the arrest, and injured. That he continued to perform duty until the 17th of May, 1877. That from the said 17th of May, 1877, until the 1st day of September, 1877, he was unable to perform any duty. That on the 1st of September, 1877, he recommenced performance of duty, and ceased therefrom on the 16th day of October, 1877, since which time he has performed no duty, and has been growing worse and become partially paralyzed. That from the 17th day of May, 1877, to the 1st of September, 1877, and from the 16th day of October, 1877, to the 1st day of July, 1878, he has received half pay, and from the 1st of July, 1878, to the 19th day of May, 1880, one-quarter pay. He seeks, by this proceeding, to compel payment of his salary for the entire time at the full rate, \$1,200 per annum. The application was opposed upon the ground that prior to July 1, 1878, by a rule of the police department, half pay for lost time was allowed to members of the police force during illness, when such illness arose from or during the ordinary discharge of police duties, which rule was amended July 1, 1878, by allowing but one-quarter pay, and that the relator's

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disability was not occasioned by the injury alleged, but arose from or during the ordinary discharge of duties.

John D. Townsend for appellant. The motion of the relator for *mandamus* should have been granted. (Laws of 1873, chap. 755, § 7; *Swift v. The Mayor*, 83 N. Y. 528.) The relator has never lost his right to the full amount of his salary as a patrolman, and the police department should be compelled to audit his claim and direct payment of it by its treasurer. (Laws of 1873, chap. 335, §§ 41, 42, 43.) The police board have no power to reduce the salary of an officer, when fixed by law, except when especially authorized so to do. (*People, ex rel. Satterlee, v. B'd of Police*, 75 N. Y. 38.) The fact that the relator was unable to render services during the period he seeks to recover salary for does not prevent a recovery. (*Dolan v. The Mayor*, 68 N. Y. 274; *Mc Veany v. The Mayor*, 80 id. 185.) The relator seeks the enforcement of a substantial right, and for such purpose he is allowed six years within which to make application. (*People v. Suprs. of Westchester Co.*, 12 Barb. 446.) There is no legal authority for the board of police commissioners to curtail the pay of any member of the police force beyond the amounts they are expressly authorized by the different statutes to deduct. (Laws of 1857, chap. 569; Laws of 1860, chap. 569; Laws of 1864, chap. 403; Laws of 1867, chap. 806, § 22; Laws of 1868, chap. 535; Laws of 1870, chaps. 137, 382, § 19; Laws of 1871, chap. 126; Laws of 1878, chap. 389; Laws of 1882, chap. 330.) Incapacity has always been considered by the legislature and treated by the board of police as an "offense" which, upon conviction, might result in dismissal. (Laws of 1864, chap. 403, § 38; Laws of 1870, chap. 137, § 60; Laws of 1873, chap. 335, § 55; Laws of 1882, chap. 410, § 272; Rules B'd of Police Comm'rs, 22, 116, 120.) Section 42 of chapter 335 of Laws of 1873 was not repealed by chapter 389 of Laws of 1878. (Laws of 1878, chap. 389, §§ 8, 9, subds. 3, 4 of § 4; Laws of 1882, chap. 330, § 4.) A patrolman on the police force of the city of New York is an officer, and as such, entitled to his

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pay so long as he is entitled to his office. (Laws of 1844, chap. 315, art. 3, § 4; Laws of 1846, chap. 302, art. 1, § 2; Laws of 1849, chap. 436, §§ 3, 4; Laws of 1853, chap. 228, art. 1, §§ 1-4; Laws of 1857, chap. 569, §§ 6, 7; Laws of 1864, chap. 403, § 13; Laws of 1870, chap. 137, § 47; Laws of 1873, chap. 335, § 43; Laws of 1882, chap. 410, § 270; *Henly v. The Mayor of Lyme*, 9 Bing. 107.) The words "pay at the rate of," in connection with compensation to patrolmen, have not a different meaning from the word "salary." (Laws of 1844, chap. 315, art. 4, § 5; id., chap. 436, § 7; Laws of 1846, chap. 302, art. 3, § 1; Laws of 1853, chap. 228, art. 4, §§ 1, 2, 3; Laws of 1857, chap. 569, § 23; Laws of 1860, chap. 259, § 63; Laws of 1864, chap. 403, § 63; Laws of 1865, chap. 592, § 3; Laws of 1866, chap. 861; Laws of 1867, chap. 481, p. 1258; Laws of 1870, chap. 137, § 47; Laws of 1873, chap. 335, § 43; Laws of 1880, chap. 521, § 2.)

D. J. Dean for respondents. The relator, having performed no service during the period for which the salary is claimed, has no right thereto, under the statute which fixes the salary to be paid to members of the police force for their services. (*Conner v. Mayor*, 5 N. Y. 285; *Smith v. Mayor*, 37 id. 518; *Dolan v. Mayor*, 63 id. 274; *Mc Veany v. Mayor*, 80 id. 185; *Wood v. Mayor*, 12 J. & S. 325; *People, ex rel. Ryan, v. French*, Gen. Term Sup. Ct., January, 1881; *Bowen v. Mayor*, Gen. Term Sup. Ct., April 7, 1880; N. Y. Daily Reg., April 8; *Terhune v. Mayor*, Common Pleas, Gen. Term, June 6, 1881.) The board of police are clothed with a quasi-judicial power to investigate and decide upon the cause of the relator's disability, and determine whether such disability proceeded from a cause which, under their rules, would justify them in allowing him full pay, one-fourth pay, or no pay. (*People, ex rel. Folk, v. Police Comm'rs*, 69 N. Y. 411.)

Samuel Hand for respondents. The compensation of the relator, under the statute, is pay for service performed, and is not a salary to which he acquires right by reason of his title to

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office, whether service be performed or be not performed. (*Smith v. Mayor*, 37 N. Y. 518; *Conner v. Mayor*, 1 Seld. 585; *Mc Veany v. Mayor*, 80 N. Y. 185; *Wood v. Mayor*, 12 J. & S. 325; *Hoboken v. Gear*, 27 N. J. L. 265; Laws of 1857, vol. 2, chap. 586, § 23, p. 214; Laws of 1860, chap. 259, § 63, p. 455; Laws of 1864, chap. 403, § 63, p. 932; Laws of 1866, vol. 2, chap. 861, p. 1990; Laws of 1870, chap. 137; Laws of 1873, chap. 353, § 43; *Minto v. Mayor*, 3 E. D. Smith, 384; *Talman v. Ins. Co.*, 1 Cush. 73, 76; *Beals v. Ins. Co.*, 36 N. Y. 527.) The continuous practice of the commissioners who have administered the law since 1857, a period of twenty-five years, acquiesced in by the patrolmen, including the relator, has much force in determining the construction of the act. (*Easton v. Pickersgill*, 55 N. Y. 314; *Troup v. Haight*, Hopk. 239-268; *People v. Dayton*, 55 N. Y.; *Union Ins. Co. v. Hoge*, 21 How. [U. S.] 35-60; *In re Female Academy of Sacred Heart*, 6 Hun, 109-113, 114; *Brown v. Mayor*, 55 How. 9.) The system of rules by which deductions have been made from the pay of members of the police force for lost time, precisely similar to the deductions made from the relator's monthly allowance, and the constructions of the law by which power to make such deductions was claimed by the commissioners, have received legislative sanction and recognition in the laws. (Laws of 1857, chap. 569, § 24; Laws of 1860, chap. 259, § 66, p. 457; Laws of 1867, chap. 806, § 7, p. 1999; § 66 of chap. 138, Laws of 1870, as amended by § 25 of chap. 383, Laws of 1870, p. 901; Laws of 1870, chap. 383, § 19; Laws of 1871, p. 259, chap. 126; Laws of 1878, chap. 389, p. 467.) An act of the legislature in recognizing the existence or interpretation of a statute is a strong argument against the assertion of the repeal of the statute, and conclusive evidence that no repeal was intended, or that the prevailing construction is erroneous. (*Smith v. People*, 47 N. Y. 340; *Rumsey v. People*, 19 id. 41; *People, ex rel. Autwater, v. Green*, 56 id. 474; *Brown v. Mayor*, 55 How. 9; *O'Gorman v. Mayor*, 67 N. Y. 495.) This court will not undertake to substitute its judgment upon the theories of medical practitioners

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in the place of the judgment of the board authorized by the rules of the department, to pass upon the question of the origin of the relator's disability. (*People v. Police Commissioners*, 69 N. Y. 411.) Such a construction of the statutes should not be made as will sustain the relator's claim if they can be reasonably construed or otherwise. (*Smith v. Mayor*, 47 N. Y. 340.)

The decision of April 11, 1882, was upon the following opinion :

DANFORTH, J. The relator's compensation was declared by section 43, of the "Act to reorganize the local government of the city of New York" (Laws of 1873, chap. 335), to be the amount then "legally paid" to such officer, and this amount is also declared to be the "salary and compensation fixed for his office" under that act.

It would then appear that the salary is annexed to, or is an incident of, the office, and the relator entitled to it so long as he possesses the title to the office. It is not only fixed by statute, but the same laws provide (§ 43, *supra*) that the commissioners may "fix the salary and compensation of such clerks other than policemen," whom they may be authorized by law to appoint, and therefore by implication, forbids them to enlarge or diminish the salary of one of the excepted class. (*The People, ex rel. Satterlee, v. The Board of Police*, 75 N. Y. 38.)

His title to the office is not denied, and it is conceded that his salary is fixed by statute, but the respondents claim that, as by sickness "he was disabled from rendering service, he thereby lost the opportunity of earning the compensation so provided, and thereafter was entitled to no salary." The argument puts the claim upon a very different foundation from that afforded by the statute. In the one case, service; in the other, title. Upon principle there would seem to be no reason for this substitution. Nor is it warranted by the statute (*supra*). Under section 41 he might be removed from office for cause, after notice and examination, or under section 42, retired from office for disability incurred in the performance of duty.

Neither of these events has happened to the relator. He is still a member of the police force, but a portion of his salary is denied to him under rules and regulations adopted by the respondents. By these rules, deductions are in effect made from the salary when the policeman is detained from duty by reason of sickness or injury caused by the discharge of police duty.

In the case before us the relator was absent under "sick-leave," made necessary, as he claims and as the case tends to show, by reason of injuries received by him while executing the duties of his office. The action of the commissioners is sought to be justified under section 41 of the act of 1873 (*supra*), which provides that "The government and discipline of the police department shall be such as the board may, from time to time, by rules and regulations, prescribe," and section 50 of the same act, which empowers the board in their discretion, to enact, modify and repeal "orders, rules and regulations of general discipline of the subordinates under their control but in strict conformity to the provisions of this act."

They relate, however, to instances of misconduct, or omission of duty, to those acts of the officer which may be termed offenses, or conduct calculated to impair the efficiency of the force and therefore deserving of punishment, and not to the involuntary failure of the officer to meet the requirements of the law by reason of sickness or disability caused by an unusual effort, or by the performance of duty assigned to him. This is apparent from the context of section 41, which forbids removal of the officer until after written charges. Lighter punishments may be prescribed by rule or regulation, but the extreme penalty only after notice. So long as the relator possesses the office, we think he is entitled to his salary. The cases (*Conner v. Mayor*, 5 N. Y. 285; *Smith v. Mayor*, 37 id. 518; *Dolan v. Mayor*, 68 id. 274; 23 Am. Rep. 168, and *McVeany v. Mayor*, 80 N. Y. 185; 36 Am. Rep. 600) cited by the respondents have no application to the question before us. None of them decides that an incumbent of a public office, entitled to an annual salary, can be deprived of any part of it by an authority which

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did not fix the salary, and which is prohibited from doing so, or that any part of it can be withheld from him by reason of his involuntary disability to perform the duties of such office. The salary "fixed for his office" has not been paid to, nor has his place been filled by, another. These, or like circumstances were in the cases cited, and in the later one of *Terhune v. The Mayor* (88 N. Y. 247).

The conclusion at which we have arrived will not, as the respondents apprehend, interfere with the exercise of power given by section 42, above referred to. The relator holds his office subject to the provisions of that statute, and will have no cause for complaint, if under circumstances to which it applies, he should be retired from office.

The orders of the Special and General Terms should be reversed, and writ of *mandamus* allowed.

The decision of January 30, 1883, was upon the following opinion :

DANFORTH, J. Upon the first argument of the appeal in this case it was assumed by the respondents: *First*. That an annual salary was fixed by law and attached to the office of patrolman. *Second*. That deductions for lost time from the pay of patrolmen were not authorized by any statute; and that the authority for such deduction depended entirely upon the power conferred upon the board of police to enact, in their discretion, orders, rules and regulations of general discipline (§ 50, chap. 335, Laws of 1873), and upon the rules in relation to deductions for sickness, enacted by the board, as a measure of discipline. *Third*. That section 42 of chapter 335, Laws of 1873, was still in force, and that the relator might be retired from office pursuant to its provisions, and we, in substance, determined that a patrolman was an officer of the police force; that the salary referred to in the statute (Laws of 1873, chap. 335, § 43), was incident to the office; that he was entitled to it until removed; that he might have been removed for cause (§ 41, act of 1873, *supra*), or retired from office for disability incurred in the performance of duty (§ 42, act of 1873, *supra*), and that the withholding of his pay could not be

justified under the authority conferred upon the respondents (§ 41, *supra*), to provide by rules and regulations for the government of the police department (see opinion of DANFORTH, J., April 11, 1882).^{*} It was afterward made to appear that certain statutory provisions were overlooked by counsel for the respondents and not called by him to our attention. A reargument was, therefore, granted, and those and other statutes are now brought forward. They certainly involve the case in more difficulty, but we think the learned counsel for the respondents lost nothing by omitting them from his consideration upon the first occasion.

First. It is contended by the respondents that section 42 of the act of 1873 was repealed by chapter 389 of the Laws of 1878, and that sections 4 and 5 of that act prescribe the only power to pension or retire a police officer. It is entitled "An act to create a police pension fund for disabled and retired policemen in the city of New York." It makes no reference in terms to the act of 1873, but contains a general repealing clause of "all acts and parts of acts inconsistent with its provisions." There are in the act no negative words, and it may be construed so as to be consistent with the provisions of section 42 of the act of 1873. By section 42 a patrolman, "if disabled while in the actual performance of duty," can be retired from office, but only at his own request, or upon notice and upon conditions expressed in that section. A special case is there provided for, and I perceive nothing in the general language of the act of 1878 (*supra*), which is fatal to it. A discretionary power is by that act, section 4, vested in the board of trustees therein mentioned, to grant pensions in certain cases, but no power is given to retire or dismiss the officer, and by section 5, any member of the police force who has served for twenty years or upwards, may, on his own application, or the certificate of the board of surgeons, be retired from service and placed on the pension-roll. The prohibition in section 42 of the act of 1873 is not abrogated, nor does section 5 of the

^{*} *Ante*, p. 270.

act of 1878 apply to the case before us. This difficulty is indeed removed by a later act, amending chapter 389 of the Laws of 1878, passed in 1882 (Chap. 330, § 4, subd. 3), which provides in substance that the board of police may, in its discretion, retire and dismiss from membership on the police force, and thereupon grant pensions, among others, to any member of the police department or force, who, while in the actual performance of duty, and by reason of the performance of such duty, shall have become permanently disabled so as to be unfitted to perform police duty. This act having been passed after the questions in this case arose, has no application to them, but is important as showing a legislative recognition of the omission in the principal act. We see no reason, therefore, to change the construction heretofore given to section 42 (*supra*). But this does not dispose of the case. The relator was neither retired from office nor granted a pension under either act. Upon the former argument the respondents conceded that the relator's salary was fixed by statute, but that having performed no service during the period for which the salary was claimed, he had no right thereto; their contention now is that the relator's compensation is "not a salary to which he acquires right by reason of his title to office, but pay for service performed." Upon both occasions it has been conceded that the relator is a patrolman, and although the words used in designating the compensation to be paid to him are not uniform in different statutes, they do not, so far as the question before us is concerned, convey a different intention.

In the Laws of 1844, chapter 315, entitled "An act for the establishment and regulation of the police of the city of New York," the then existing watch department was abolished and a day and night police not to exceed eight hundred men, including captains, assistant captains and policemen, established in its place, to be appointed for a particular time, the policemen for one year, with compensation to be fixed by the common council, not exceeding \$500 to each patrolman, and it declares that the salaries "shall be paid by the comptroller by warrant, semi-monthly." (§ 5, art. 4, *supra*.) The patrolmen

might be removed for cause, upon notice. (Art. 3, § 4.) This act was amended in 1846 (Chap. 302), and the time of service extended to two years, and sickness and disability made an excuse for absence from duty, but not in any other particular material here, and again in 1849 (Chap. 436), when compensation "for any period during which" members of the force were absent from duty, was forbidden, "except" allowed by the mayor in cases in which he shall be satisfied that the absence was consequent upon disease or injury contracted in the public service. The term of service was enlarged to four years, and it was declared that the compensation fixed for members of the force by the common council should not be increased or diminished during the time for which they were appointed.

In 1853, a new act was passed (Chap. 228), entitled "An act in relation to the police department in the city and county of New York." It repeated many provisions of the previous acts, declared that no member of the police department should be reappointed, "who shall have resigned before the expiration of his term of office," required certain qualifications in the candidate for appointment, moral, mental and physical, and certain literary attainments, and enacted that all members thereafter "appointed should hold their offices during good behavior," and be removed only for cause, in the manner prescribed in the act, and after notice to the accused of the complaint against him, and opportunity to be heard by counsel, and power to compel the attendance of witnesses in his behalf (§ 4). It provided that compensation should be fixed by the common council, and "the salaries" (among others) of policemen be paid by warrant. It repealed all previous acts inconsistent therewith, and not only failed to reproduce the condition which made the sick policeman's pay depend on the mayor's pleasure, but expressly declared that if absent from duty "in consequence of disease or injuries contracted in public service," he should "receive full pay" (§ 8). By the act of 1857 (Chap. 569), a metropolitan police district was established, and a police force consisting, among others, of patrolmen to be appointed by the police board, each to hold office during such

time as he should faithfully observe and execute all the rules and regulations of the said board, the laws of the State and the ordinances existing within the district where he might be on duty (§ 7), prescribed his qualifications for "office," the manner of his removal therefrom, and if removed for cause, pronouncing him disqualified "to again hold any office in the police force." Compensation is provided for (§ 23). To members of the board an allowance of \$8 for each day of actual service; to its treasurer and its clerk and his deputy, to the superintendent of police and his deputy, to each sergeant of police and each inspector or captain of police, a salary which is named, and then declares that the pay of each patrolman shall be at the rate of \$800, and of each doorman at the rate of \$700 per year. The act of 1860 (Chap. 259, § 63) is in this respect substantially the same, and so is that of 1864 (§ 63), but the compensation or pay of patrolmen is increased to \$1,000. That no distinction was intended by the use of these different words "salary" and "pay," or if there was, that the intention was abandoned, is apparent from the subsequent legislation.

In 1865 (Chap. 592, § 3) the commissioners of the metropolitan police were directed to appoint five additional policemen, and it is declared that "the salary of the five policemen so to be appointed * * * shall 'be' the same salary as other policemen are paid in the metropolitan district." The words "patrolmen" and "policemen" are used indiscriminately and mean the same persons. (Act of 1857, *supra*, § 36.) In 1866 (Chap. 861) section 63 of the act of 1864, was amended by increasing the pay of patrolmen to the "yearly rate of \$1,200." By the act of 1867 (Chap. 481), making appropriations for certain expenses of government, a sum of money is awarded "for the metropolitan police board, being the amount paid for the salaries of policemen appointed under chapter 592 of the Laws of 1865," and it declares that "henceforth the salaries of the policemen so appointed or hereafter appointed shall be paid in the same manner that the salaries are paid of other members of the metropolitan police force." In 1870 (Chap. 137, § 47) the local government of the city of New York was re-

organized, and in the statute effecting it the words "salary" and "compensation" are used in the alternative as defining the same thing, and the position of the person receiving it is treated as an office. "Every person," it says, "connected with the metropolitan police department at the time this act shall take effect, and designated to do duty in the city of New York, * * * * shall continue in office and be transferred by the operation of this act to the department herein created, and the amount, or salary, or compensation now paid to such person in the metropolitan police district shall be the salary and compensation for his transferred office under this act." We are thus brought to the act of 1873, which was before dwelt upon, but which will seem more significant when read in connection with the line of statutes now before us. It is entitled "An act to reorganize the local government of the city of New York" (Chap. 335), and in treating of the police department (Art. 7), declares (§ 43) that every person connected with the police department of the city at the time the act takes effect (with an exception not material here) "shall continue in office, and the amount of salary or compensation now legally paid to such person (with another exception not material to any question before us) shall be the salary or compensation fixed for his office under this act." The legislation of 1880 (Chap. 521, § 2) amending the act of 1873, confirms the construction before given by us to the principal act. It declares "the annual salaries" to be paid to persons therein named, and among others the members of "the uniform police force," and "fire department," and defines their compensation as a "salary." From these statutes it seems apparent that a person once admitted to the police force takes his position as an office, to be held by him so long as he performs the duties laid upon it, and to enjoy its salary until by some form of law he is removed. By its permanence and stability of compensation it is probable that better service is obtained, and greater faithfulness in the execution of business which frequently puts at hazard life or limb. Both parties have urged in support of their respective claims the authority of usage. The relator by

reference to instructions and advice given to the police commissioners from time to time by the law department of the city, as to the tenure of office of persons occupying positions like that of the relator, showing an exposition of the statute, conforming to the construction we have given to it, and the respondents by averring a continuous practice of the commissioners to make deductions from salary of similar character to those now complained of. If this practice has prevailed, it has not been supported by enactment of the legislature or by judicial decision, and however general it may have been, it cannot be effectual to control the true construction of the law, or impair a plain right given by the statute.

I can find no warrant or authority by which we can limit the compensation of a patrolman to a sum earned by "actual service," or construe a statute giving him an annual salary during good behavior, as we should construe the provision in the act of 1857 (§ 23, *supra*), giving a *per diem* pay to a commissioner for "actual service." The very plain and great difference in the language forbids it. The various acts cited by the learned counsel for the respondents, as recognizing the practice referred to (Laws of 1857, chap. 569; Laws of 1860, chap. 259; Laws of 1867, chap. 806; Laws of 1870, chap. 383; Laws of 1878, chap. 389), relate to the police fund and its augmentation from various sources — gifts, rewards and fees, fines imposed upon members of the police force by way of discipline, deductions from pay on account of lost time at varying sums per month, but falling short of the case in hand.

First. The enactment to which I have already referred (Laws of 1853, chap. 228, § 8, art. 1), providing "that policemen absent from duty through disease or injuries contracted in public service, shall receive full pay," has not been in terms repealed by any statute to which we have been referred, or which I have been able to find. It is not affected by the general repealing clause of subsequent statutes, for it is inconsistent with none of them. By the act of 1857 (Chap. 569, § 36), the words "policeman" and "patrolman" are declared to be identical in meaning in any act not repealed thereby.

Second. But if we look at the provisions of the acts cited, the same result follows: we nowhere find an intention to deprive the disabled officer of the immunity thus given, or legislative sanction or recognition of the process by which the relator was deprived of his pay during sickness and while kept in the police force. By the act of 1857 (*supra*, § 24), the police fund is derived from sources in no way relating to the one in question. In 1860 (Chap. 259, § 66), it was increased by fines imposed by way of discipline and proceeds of suits for penalties. In 1867 (Chap. 403, § 22) and 1870 (Chap. 137, § 66), some changes were made not important here, but chapter 383 of the Laws of 1870 (§ 19) directed that there should be taken monthly out of the moneys deducted from the pay of members of said force on account of lost time, a sum calculated at the rate of fifty cents per month for each member of such force. In 1871 (Chap. 126), it was raised to one dollar, in 1878 (Chap. 389), to three dollars, and in 1882 to four dollars per month.

It is apparent that the resolution of the respondents cannot stand on these premises. The relator's pay has not been diminished with any reference to them. At one period he was paid one-half, at another only one-quarter of his salary. The moneys detained exceed it is said \$2,000, a sum largely in excess of the aggregate of any sum specified by any statute, or which could be obtained by its methods. But it is enough to say that the application of the statute is not resisted upon the ground that the reduction was under the statute, nor do the respondents' papers lay a foundation for it. On the contrary we perceive that the action of the respondents contravenes the object of the legislature, whose scheme, as manifested by various statutes (*supra*), was to secure efficiency in the police force by the selection of persons having certain prescribed qualifications, then experience and permanence by extending the term of office from one to two years, then to three years, afterward to four years, and finally to a period defined only by the good behavior of the officer, and securing him against removal until, after an opportunity to be heard, he should be

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found guilty of offense, thus promoting his independence by a fixed salary payable at stated times, giving to his superiors no power over his subsistence and stimulating him to a faithful and energetic devotion to the important duties of his office, not only by a permanent position, while he could perform them, but by the provision of a pension if during their performance he became disabled. In this way also obtaining for actual service a body of efficient men, and securing the retirement of those who became incompetent. The respondents have so dealt with the relator as to defeat this purpose. Although incapable of labor, he is denied a pension, and against his will retained in office without advantage to the public, because filling a position for which he is disqualified. For this he is not responsible. It is the error of the respondents. We find no reason, therefore, for changing the views before expressed, and are still of the opinion that the relator is entitled to his salary by virtue of his office, and that the respondents had no legal right to withhold it. He has been adjudged guilty of no fault, subjected to no fine, incurred no liability to punishment, nor has he lost time. By permission of lawful authority he has been absent on "sick leave," made necessary, as that permission implies, by the faithful performance of duty. This result reached by us in no respect interferes with the power of the respondents to control by rules and regulations the conduct and faithful attendance of members of the force to the duties of their office, and is applicable only to a case where the absence of a member is enforced by disease or injuries incurred while executing the duties of his office. Such is this case as it stands on the concession in the opposing affidavits of the respondents. The statute allows the retirement of a policeman "if disabled while in the actual performance of duty," and the concession in this case is that the relator's injury arose "from the ordinary discharge of police duty, or during the ordinary discharge of police duty," in contradistinction apparently from such injury or sickness caused by "unusual exposure or exertion" while in the discharge of such duty. The condition goes beyond the statute.

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We must adhere to the conclusion before announced, that the order of the Special and General Terms be reversed and the writ of *mandamus* allowed.

All concur.

Ordered accordingly.

CHARLOTTE RAMSDEN, Appellant, v. EDWARD C. RAMSDEN,
Respondent.

An action by a wife against her husband for maintenance and support simply is not maintainable under the Code of Civil Procedure ; the provision of said Code (§ 1766) authorizing a judgment, making provision for maintenance and support without a judgment of separation, applies only where the action is for a separation.

It is only when an action is brought by the wife for divorce or separation, as prescribed by said Code, that an allowance for alimony is proper.

Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, *held*, that the court had no jurisdiction to make an order granting alimony *pendente lite* or counsel fees.

Davis v. Davis (75 N.Y. 221), *Turrel v. Turrel* (2 Johns. Ch. 391), distinguished.

(Argued January 16, 1883 ; decided February 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made November 24, 1882, which reversed an order of Special Term which required defendant to pay plaintiff \$20 per week alimony *pendente lite* and \$250 counsel fees. (Reported below, 28 Hun, 285.)

The complaint in this action, after alleging the marriage of the parties, and setting forth various acts of cruelty and ill-treatment on the part of defendant toward the plaintiff, asked judgment that defendant be required to pay plaintiff a sum certain for her maintenance and support, and also asked temporary allowance for alimony and counsel fees.

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J. Tredwell Richards for appellant. A decree for maintenance alone may be made under the statute in all cases where any of the causes specified in section 1762 of the Code are shown to exist. The same causes are equally ground for judgment of separation, or for a judgment of maintenance. (Code of Civ. Pro., §§ 1762, 1766; *Turrel v. Turrel*, 2 Johns. Ch. 391; *Davis v. Davis*, 75 N. Y. 221, 225.) Alimony *pendente lite* may be granted in an action brought as prescribed in articles 2 and 3 of title 1 of chapter 15 of the Code. (Code, § 1769.)

John V. B. Lewis for respondent. An action for maintenance alone cannot be maintained, and an order for alimony therein is unauthorized. Alimony *pendente lite* can only be ordered in a divorce suit. (2 Bishop on Marr. and Div., §§ 351, 354-359; *Ball v. Montgomery*, 2 Ves. Jr. 191, 195; *Atwater v. Atwater*, 36 How. 431; *Douglas v. Douglas*, 5 Hun, 144.)

DANFORTH, J. The Code of Civil Procedure (Chap. 15) contains certain special provisions regulating matrimonial actions, and among others actions for a divorce or separation, but it contains no provision which will sustain the case made by the plaintiff. By article 3, chapter 15 (*supra*), section 1762, it is declared that an action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board forever, or for a limited time for either of certain specified causes, all of which appear to exist in this case, and section 1766 provides where the action is brought by a wife, the court may in the final judgment of separation give such directions as the nature and circumstances of the case require; in particular it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties; and it then provides that the court may in such an action render a judgment compelling the defendant to make the provision specified in this case, where,

under the circumstances of the case, such a judgment is proper without rendering a judgment of separation.

The difficulty of the plaintiff's case is that the action brought by her is not such action as the statute authorizes. It is not an action to procure a judgment of separation. No separation is asked for, and it is apparent that the omission in this respect was intentional. The plaintiff seeks maintenance and support, nothing more, and the learned counsel for the appellant says it was competent for her to ask relief in either form, and argues that, "if the court can grant maintenance apart from other relief, then the plaintiff may properly have that alone, and to pray for relief which is not really sought is not merely a formal absurdity, but it is misleading to the defendant."

The answer, however, is that the action is a statutory one, and if prosecuted, must conform to the terms upon which it is permitted. The discretion which may withhold one kind of relief and grant the other is confided to the court, and its exercise in judicial proceedings cannot be limited by the plaintiff. The legislature has prescribed the nature of the relief to be sought, and only when that is apparent from the complaint, can the court having jurisdiction grant less than the plaintiff asks for, but has no power to do that where the object sought is not that named in the statute. The cases referred to by the appellant are not to the contrary. In *Davis v. Davis* (75 N. Y. 221) a remark is made which, taken by itself, implies that a plaintiff may waive a decree for separation, although entitled to it, and the appellant supposes she may so elect, at the beginning, as well as at the close of the case. But neither the text, nor the decision rendered, warrants that construction. A decree for maintenance was before the court, and was reversed upon the ground that as a cause for separation was not established, the court had no power to make provision for the wife's support, and the suggestion now relied upon was made as a possible effect of the statute then under consideration. But the question was not before the court, and the possible volition of the wife was mentioned as one of the circumstances upon which the court might, in a different case, exercise its discretion.

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In *Turrel v. Turrel & Jones* (2 Johns. Ch. 391) the case presented was under the act (Sess. 36, chap. 102), authorizing the filing of a bill by a wife, specifying therein particularly the circumstances on which she relies, and praying such relief as she may think herself entitled to. It is plain that the only object of the bill was to have certain money, given to the wife by her father, and which was then in the hands of the defendant, Jones, as his executor, secured, as a separate provision for the wife, and it appeared that the husband had threatened that when he obtained possession of such money, he would not appropriate any part of it toward her maintenance. But the statute before us, as we have seen, declares the object of the action which the wife may bring, and the court has no jurisdiction to depart from it.

In *Atwater v. Atwater* (36 How. Pr. 431; 53 Barb. 621) the General Term held that the statute did not authorize a complaint to be filed by a wife for her support and maintenance by her husband, as a distinct substantive relief. This was, we think, the true construction of the statute then in question, and the one now before us must be dealt with in the same manner. Without considering, therefore, whether the residence of the plaintiff has been sufficient to give the court jurisdiction, we think the order appealed from was proper, and should be affirmed, but without costs.

All concur.

Order affirmed.

In the Matter of the Probate of the last Will and Testament
of JOHN HANCOCK, deceased.

H. died, leaving a will and three codicils; these were presented for probate, which was contested. On stipulation of the parties an order was entered to the effect that the personal assets of the estate be paid into court to abide the result of the litigation, and the surrogate thereupon took possession thereof. That officer admitted the will to probate, but denied probate of the codicils. The executors named therein, who had joined in the stipulation, appealed to the Supreme Court, where the decree of

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the surrogate was reversed as to the first codicil and affirmed as to the others. After the death of the surrogate, and on application of said executors to his successor, the decree was declared null and void, on the ground that the surrogate was interested. *Held* error; that the interest was not a disqualifying one; and that the parties by whose consent the trust was reposed could not be heard to complain; also, that as by law the funds on hand at the death of the said surrogate passed into the custody of his successor, the latter could not exercise jurisdiction to vacate the decree for a cause which existed equally as to himself.

In re Hancock (27 Hun, 78), reversed.

(Argued January 22, 1883; decided January 30, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made February 13, 1882, which affirmed a decree of Seth B. Cole, surrogate of the county of Rockland, setting aside a decree of E. A. Suffern, former surrogate of said county. (Reported below, 27 Hun, 78.)

The facts appear sufficiently in the opinion.

Amos G. Hull for appellants *Allen et al.* The custody by the surrogate of the funds of this estate created no disqualifying interest. (*Matter of Ryers et al.*, 72 N. Y. 15; *Telluson v. Rendelsham*, 7 H. of L. Cas. 429; *Stuart v. Mechanics B'k*, 19 Johns. 495; *Ten Eycke v. Simpson*, 11 Paige, 177, 179; *Moore v. White*, 6 Johns. Ch. 360; *People v. Edwards*, 15 Barb. 529, 531; Code of Civil Pro., §§ 2537, 2786, 2836; Redf. Pr. in Surr. Cts. 742; Dayton's Surr. 621; Laws of 1880, chap. 150; 3 R. S. [5th ed.] 195; *Wildes v. Russell*, Eng. Law Rep., 1 Com. Pleas, 747.) The Supreme Court and the Court of Appeals having examined the facts as an original case, their decree is conclusive on all the parties. (Redf. Pr. Surr. Cts. [2d. ed.] 791; Code of Civil Pro., § 2585; *Haviland v. Taylor*, 53 N. Y. 6, 7; 28 id. 494; *Thompson v. Stevens*, 62 id. 634.) The will in question being a will which was admitted to probate as a will of personal estate only, the statute prohibits any application to open the probate unless made within one year after the recording of the

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decree admitting the will to probate. (Code of Civil Pro., § 2648; Redf. Surr. Pr. 257; Graham on New Trials, 464; *Warren v. Hope*, 6 Greenl. 479 *Porter v. Talcott*, 1 Cow. 359; *Monell v. Kimball*, 1 Greenl. 32; *Shumway v. Fowler*, 4 Johns. 425.) The executors, Hutton and Swenarton, are precluded by their own conduct from raising the question of interest. (*Wakefield B'd of Health v. West Riding & G. R. W. Co.*, 6 B. & S. 802.) In the State of New York the disqualification of judges by reason of interest does not apply to Surrogates' Courts, unless an objection shall be taken on behalf of the parties interested at the first hearing or proceedings before the surrogate. (R. S., §§ 2, 4, title 1, chap. 3, part 3; Laws of 1844, chap. 300, § 6; 4 Edmunds' ed. Statutes at Large, 698; 3 R. S. [Banks' 6th ed.] 439, § 28; R. S., part 2, chap. 6, title 2, art. 3, § 48; 2 Edmunds' ed., 80; 3 R. S. [Banks' 6th ed.] 85, § 75.)

Rufus L. Scott and *William H. Taggard* for *A. Stewart Walsh et al.*, appellants. The surrogate was not disqualified by reason of holding the estate. (*Disbrow v. Mills*, 62 N. Y. 604; 3 R. S. [6th ed.], § 54, p. 116; § 58, p. 117; §§ 61, 62, p. 118; § 79, p. 120; § 93, p. 122; Redfield on Surr. Pr. 742; Code of Civ. Pro., §§ 2537, 2836, 2798, 2799.) Surrogate Cole was bound by the decree of the Supreme Court and Court of Appeals, and his own action in executing them. (Code, § 2586; *Footte v. Beecher*, 78 N. Y. 158; *Clapp v. Fullerton*, 34 id. 195; *Schenck v. Dart*, 22 id. 420; Graham & Waterman on New Trials, 465; *Clayton v. Wardell*, 3 Bradf. 1; Redfield's Surrogate, 792, 793 [2d ed.]; *Thompson v. Stevens*, 62 N. Y. 634.) The return submitted to the General Term, containing all the evidence taken before Judge SUFFERN, and consented to by all the parties knowing all the facts, and the decisions and decrees of the appellate courts stand as upon a case made by consent. (Code, § 1279; *Matter of Rogers*, 72 N. Y. 15; *Bell v. Vernoooy*, 18 Hun, 125; 2 Abb. U. S. Pr. 205; *People v. Lember*, 2 Hun, 269; 3 R. S. [6th ed.], § 28, p. 439; Code, § 2497; Redfield's Law &

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Practice, 25.) The matter charged does not come within any definition of a disqualifying interest. (Code, § 2514, subd. 11; § 2496, subd. 3.) Whatever disqualifying element may appear in this matter was before the Supreme Court and the Court of Appeals on the original appeal from Judge SUFFERN's decision, and the same was adjudicated by said appellate courts and such adjudication is final. (*Embury v. Conner*, 3 N. Y. 522; Code Civ. Pro., § 3347, subd. 8.)

Walter H. Shupe for respondents. The procedure followed in this motion is strictly regular. (Code, § 2481, subd. 6; Laws of 1870, chap. 359, § 1; *Brick's Estate*, 15 Abb. Pr. 12, 36; *Dobke v. McClaran*, 41 Barb. 491; *Campbell v. Thatcher*, 54 id. 382; *Vreedenburg v. Calf*, 9 Paige, 128; *Pew v. Hastings*, 1 Barb. Ch. 452; *Harrison v. McMahon*, 1 Bradf. 283; *Sipperly v. Bauous*, 24 N. Y. 46; *Strong v. Strong*, 3 Redf. 477; *Bailey v. Hilton*, 14 Hun, 8; Code, §§ 1282-1292; *Hallet v. Richters*, 13 How. 43; *Chappel v. Chappel*, 12 N. Y. 215; *Birdsoff v. Dojan*, 17 Abb. 36; *Moulton v. De Ma Carty*, 6 Rob. 470; *Lambert v. Conversee*, 22 How. 265; *Bunnell v. Henry*, 13 id. 142; *McMurray v. McMurray*, 9 Abb. [N. S.] 315; Throop's note to § 1283 of Code; *Booth v. Kitchen*, 7 Hun, 260.) There being no denial of the statements made in the affidavit of Walter H. Shupe, verified September 24, 1881, the averments in such affidavits are sufficient proof. (*Cumming v. Wooley*, 16 Abb. Pr. 297; *Evans v. Holmes*, 46 How. 515.) The provision of the Code of Civil Procedure (§ 46), disqualifying a judge from sitting in a matter in which he is interested, applies to the act of A. Edward Suffern, as surrogate, in the entry of the decree of probate, Nov. 10, 1879. (3 R. S. 275, part 3, chap. 3, title 1, § 2; 3 R. S. [6th ed.] 436, 439; Laws of 1844, chap. 300, § 6; 2 R. S., part 3, chap. 3, title 1, § 14; 1 R. L. 446, § 16, as amended by Laws of 1830, chap. 320, § 19; 2 R. S. 79, part 2, chap. 6, title 2, § 48; 3 R. S. [6th ed.] 85; Laws of 1847, chap. 280, § 81; 3 R. S. [6th ed.] 437, § 8; Code of Civil Procedure, § 46; Laws of 1877, chap.

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417; 2 R. S. 275, part 3, chap. 3, title 1, § 2; Laws of 1847, chap. 280, § 81; 2 R. S., part 2, chap. 6, title 2, art. 3, § 49, as amended by Laws of 1843, chap. 121, § 1; Laws of 1847, chap. 470, §§ 27, 32; 3 R. S. [6th ed.] 85, 86, § 78; Laws of 1871, chap. 859, § 8; 1 R. S. [6th ed.] 392, § 25; Laws of 1880, chap. 245; Code of Civil Procedure, §§ 46, 3347, subd. 11.) Any relation between a judicial officer and a subject-matter, through which he may be affected to his personal or pecuniary advantage or disadvantage, or required to account for acts in respect thereto in a representative capacity, is a disqualifying interest. (*Hawley v. Baldwin*, 19 Conn. 589; *Heaketh v. Braddock*, 3 Burr. 1847; *Pearce v. Atwood*, 13 Mass. 339; *State, ex rel. Claunch, v. Castleberry*, 23 Ala. 91; *Wilson v. Wilson*, 36 id. 655; *Bacon, Appellant*, 73 Mass. 391; *Moses v. Julian*, 45 N. H. 52; 1 Hadley, 52, 155, 59; *Knight v. Hardman*, 17 Ga. 253; *Matter of Dodge*, 77 N. Y. 107; *Dimes v. Grand Junction Canal Co.*, 3 H. of L. Cases, 759; *Gregory v. C. C. & C. R. R. Co.*, 4 Ohio, 678; *P. Ry. Co. v. Howard*, 20 Mich. 18; *Milner v. Ga. R. R. & B. Co.*, 4 Ga. 385; *Rivenburg v. Henners*, 4 Lans. 211; *Converse v. McArthurs*, 17 Barb. 410; *Peyton's Appeal*, 12 Kans. 398.) If a judge of probate is either a creditor or debtor of an estate he is disqualified by reason of interest. (*Cottle, Appellant*, 22 Mass. 483, 484; *Coffin v. Cottle*, 26 id. 287; *Sigourney v. Sibley*, 38 id. 101, 104; 39 id. 507; *Gay v. Minot*, 57 Mass. 307; *Queen v. Justices of Suffolk*, 18 Q. B. 416; *S. C.*, 14 E. L. & E. 93; *King v. Inhab. of Yarpole*, 4 Term R. 71; *Queen v. Justices of Hertfordshire*, 6 Q. B. 753; *Darling v. Pierce*, 15 Hun, 546; *People, ex rel. Roe, v. Suffolk*, Com. Pleas, 18 Wend. 550; *Fox v. Johnson*, 3 Cow. 20; *Strong v. Strong*, 63 Mass. 570; *Williams v. Robinson*, 60 id. 333; *Freelove v. Smith*, 9 Vt. 180; *Thelluson Will Case*, 7 H. of L. Cases, 429; *Robinson v. Melvin*, 14 Kans. 488; *Hall v. Thayer*, 105 Mass. 219; *Tolland v. Co. Comm'rs*, 13 Gray, 12; *Fox v. Hazleton*, 10 Pick. 275.) Where an interested judge is prohibited to sit by statute, all his proceedings are *coram non iudice*, and absolutely

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void. (*Oakley v. Aspinwall*, 3 N. Y. 547; *Edwards v. Russell*, 21 Wend. 63, 64; *Foot v. Morgan*, 1 Hill, 654; *Schoonmaker v. Clearwater*, 41 Barb. 200; 1 Keyes, 310; *Converse v. McArthur*, 17 Barb. 410; *People v. Tweed*, 50 How. 434; *Gay v. Minot*, 57 Mass. 352; *Hall v. Thayer*, 105 id. 219; *Sigourney v. Sibley*, 38 id. 101; *Coffin v. Cottle*, 26 id. 287; *Cottle, Appellant*, 22 id. 483; *Bacon, Appellant*, 73 id. 391; *Hawley v. Baldwin*, 19 Conn. 589; *Heydenfeldt v. Towns*, 27 Ala. 423; *Moses v. Julian*, 45 N. H. 52; *State, ex rel. Claunch, v. Castleberry*, 23 Ala. 91; *Wilson v. Wilson*, 36 id. 655; *People v. De La Guerra*, 24 Cal. 77; *Stockwell v. Town B'd*, 22 Mich. 341; *P. R'y Co. v. Howard*, 20 id. 18.) The defect goes to the jurisdiction and cannot be made good by consent, waiver, stipulation, or even confirmation; nor does it matter whether the judgment rendered be altogether a just one; and where the interested judge is only one of several sitting, the rule is the same. (*Stockwell v. Town B'd*, 22 Mich. 341; *Oakley v. Aspinwall*, 3 N. Y. 547; *Milner v. Ga. R. R. & B. Co.*, 4 Ga. 385; *Schoonmaker v. Clearwater*, 41 Barb. 200; *Moses v. Julian*, 45 N. H.; *Chambers v. Clearwater*, 1 Keyes, 310; *Strong v. Strong*, 63 Mass. 570; *Hall v. Thayer*, 105 id. 219; *Sir Fr. Bacon's Case*, 2 Camp. Lives [2d Am. ed.], 336; *Gay v. Minot*, 57 Mass. 352; *Sigourney v. Sibley*, 33 id. 101, 104; *Queen v. Justices of Hertfordshire*, 6 Q. B. 753; *Queen v. Justices of Suffolk*, 18 id. 416; *Post v. Black*, 5 Denio, 66; *Tousley v. McDonald*, 32 Barb. 604; *Welles v. Thornton*, 45 id. 390; *Wilson v. Town of Caneadea*, 15 Hun, 218; *People, ex rel. Green, v. Smith*, 55 N. Y. 135; *Green v. Comm'rs for Cheltenham*, 1 Q. B. 467; *Wyse v. Withers*, 3 Cranch, 331; *Latham v. Egerton*, 9 Cow. 227; *Kamp v. Kamp*, 59 N. Y. 212; *Clayton v. PerDun*, 13 Johns. 218; *Roderigas v. E. R. S'vs Inst.*, 76 N. Y. 318; *Matter of Ryers*, 72 id. 13.) The taking and possession of actual assets or property belonging to the estate of the decedent by A. Edward Suffern was either as a court or as an individual. If as a court, it was legally impossible; if as an individual, Suffern became the trustee of an

implied trust, and as such was personally liable to account, and therefore interested. (1 Laws of New York, revised, 1813, 446, chap. 79, § 27; 2 R. S. 220, part 3, chap. 2, title 1, § 1; 3 R. S. [6th ed.] 79, 325, 327; 2 Laws of Maryland, chap. 101; 2 R. S. 76, part 2, chap. 6, title 2, art. 2, § 38; 3 R. S. [6th ed.] 79; *Walker v. Wollaston*, 2 P. Wms. 589; *Wilbur v. Rich*, 2 Atk. 286; Prior, 1742; Willard on Executions, 219; Perry on Trusts, §§ 166, 217; id., §§ 443, 446.)

DANFORTH, J. John Hancock died on the 12th of September, 1874, leaving a will and three codicils, in which he named John Swenerton, John W. Hutton and John Bell Locke, executors. In the same month the will was presented for probate by John Swenerton to A. Edward Suffern, the then surrogate of Rockland county, and the usual citation issued, returnable on the 16th of November, 1874. At the return day allegations were made by various parties against the validity of the will and codicils. On the 26th day of December, 1874, Walsh, one of the next of kin of the testator, presented his petition to the surrogate for special letters of administration, authorizing the preservation and collection of the goods of the deceased, whereupon on the 18th of January, 1875, it was stipulated in writing by the proponents and contestants, and their counsel, and Walsh, his attorney, "that the personal estate and all effects, properties, choses in action, and demands thereunto belonging be paid and delivered into court to abide the further order and disposition of the court" thereupon. This stipulation was filed, and an order was to that effect duly entered. The surrogate took possession of the property. Litigation over the probate of the will continued with such success that on the 10th day of November, 1879, he admitted the will to probate, and issued letters testamentary to Messrs. Locke, Allen and Walsh, the executors named therein. He denied probate to the first codicil as not well executed, and to the second and third as having been induced by fraud. No appeal was taken from the decree admitting the will to probate, but John Swenerton and John W. Hutton appealed to the Supreme Court from

so much of the decree as rejected the three codicils, and on the 13th of September, 1880, the General Term of the second department reversed the decree as to the first codicil, and affirmed it as to the second and third. An appeal was then taken to this court from so much of the judgment of the Supreme Court as affirmed the surrogate's decree, and on the 1st of March, 1881, it was affirmed, and the remittitur duly filed on the 12th of March, 1881.

After this, but when does not appear, Surrogate Suffern died and was succeeded by Surrogate Cole. On or about August 24, 1881, Hutton presented to him a petition to have the decree of November 10, 1879, vacated, and a new trial granted, and on the 28th of December, 1881, the application was granted and the decree was declared null and void. The precise ground of the application and the order was that the surrogate by whom the decree was pronounced did, on the 25th or 26th of January, 1875, convert certain assets embraced in the stipulation and order of January 18, 1875, into money, and "neither paid the same into court, nor to the estate, nor to any one for the benefit of the estate," and so became interested in the estate to that amount, and remained so from that date. This fact has not been established by any legal proceeding, nor by legal evidence. As to it, the surrogate in his life-time was not heard, nor since his death, have his representatives been heard, but from the moment he received the property under the stipulation, he became liable to account for it, and he then acquired an interest of the same kind as that now charged upon him. The evidence of conversion, therefore, need not be criticised. Was the interest with which he was invested, assuming the allegations to be true, a disqualifying one? *First.* It is clear he acquired no interest in the estate, nor in the subject-matter of the question upon which he adjudicated.

Second. If the will went to probate, he was liable to account to the executors and persons interested, under the will; if it was denied probate, he must account to the personal representatives of the deceased.

Third. He was placed in this position by the wish and con-

sent, among others, of the party who now complains, but who acquiesced in the probate of the will, and procured from the Supreme Court a judgment in favor of the codicil, and who, as party to the stipulation, was cognizant of the trust reposed in the surrogate, if not of the conduct concerning which he now complains.

Judicial proceedings would be rendered insecure and perverted into snares for litigants, if a party so situated could successfully impeach a decision which he promoted at a time when he was not ignorant of the cause of invalidity which he now sets up. Of necessity sometimes, and by force of the statutes in many cases, the surrogate receives funds belonging to estates concerning which he acts as custodian, and as to which he is at all times liable to account, and it would be a singular result if that liability should deprive him of jurisdiction in controversies properly before him. It may involve him in difficulty, and as the funds on hand at the death of Surrogate Suffern passed by law into the custody of his successor, it is difficult to see upon what principle he could exercise jurisdiction to vacate the decree of his predecessor, for a cause which also existed as to himself.

To what length shall the rule of disqualification be carried? The present surrogate, as appears by the papers, has paid over to the executors of John Hancock, upon letters issued by Surrogate Suffern, certain money and assets assumed to belong to that estate. Did he pay over the whole, or did he pay over some which belonged to Suffern personally, or to other estates? Can the executors of Hancock be required to account before him, or has he lost jurisdiction either to entertain such proceedings, or proceedings by the estate of Suffern, or in behalf of other estates, whose funds may be alleged to have mingled with those received by Suffern from the Hancock estate? *Disbrow v. Mills* (62 N. Y. 604) shows that such perplexities may arise, but it does not appear that loss of jurisdiction is to follow. It is no doubt a rule of the common law that no man can be a judge in his own cause, and this also has been declared by statute, but the interest must be that of party to the matter,

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or of such a nature as would involve direct pecuniary gain or loss. Here it was neither, nor was it even contingent or possible.

I have examined many of the various cases cited by the respondent, and all which from the citation seemed likely to support his views, but discover none which give color to the contention upon which the judgment appealed from rests.

The decree of the surrogate vacating the decree made by Surrogate Suffern, November 10, 1879, and the judgment of the General Term thereon, should, therefore, be reversed, with costs to be paid by the respondent personally.

All concur.

Judgment reversed.

NANCY E. BRADLEY, as Administratrix, etc., Respondent, v.
NELSON R. MIRICK, Appellant.

The defendant appeared herein by attorney ; issue was joined which was regularly brought on for trial on notice, and the defendant's attorney not appearing, the trial proceeded as upon default. B., the original plaintiff, was examined as a witness. The default was, on application of defendant, set aside and a new trial granted. Upon the second trial, the minutes of the testimony of B. given on the first trial, he having died in the mean time, were offered in evidence and rejected on the ground that defendant had no opportunity to cross-examine the witness. *Held* error ; that the evidence was competent, both at common law and under the Code of Civil Procedure (§ 880) ; and that as defendant had the power to appear and cross-examine his failure so to do was a waiver of that privilege.

Bradley v. Mirick (25 Hun, 272), reversed.

(Argued January 23, 1883 ; decided February 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made October 28, 1881, which affirmed an order of Special Term granting a new trial herein. (Reported below, 25 Hun, 272.)

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This action was brought originally by Benjamin J. Bradley, the present plaintiff's intestate, to recover the value of a quantity of oil, alleged to have been delivered by him to defendant upon the promise of the latter to return a like quality and quantity.

Defendant appeared by attorney and issue was joined which was regularly noticed for trial by plaintiff at a Circuit. It was brought on for trial and defendant's attorney not appearing, the trial proceeded as on default. Plaintiff was sworn and examined as a witness and judgment was rendered in his favor. This default was subsequently opened on motion on the part of defendant, who was, as matter of favor, allowed to come in and defend, the judgment standing meanwhile as security. Before a second trial plaintiff died and the present plaintiff was substituted. On the second trial the minutes of the testimony of Bradley given on the first trial were offered in evidence for plaintiff, but were, upon objection, excluded, to which plaintiff's counsel duly excepted, and plaintiff was nonsuited.

Further facts are stated in the opinion.

John H. Camp for appellant. The court properly excluded the evidence of Mr. Bradley, which plaintiff asked to read from the stenographer's minutes given at the time judgment was taken herein by default, when defendant did not appear either in person or by attorney, and had no opportunity to cross-examine said Bradley. (1 Greenleaf, §§ 163-164, p. 239, note; 1 Phillips on Evidence, 389-400; 4 Jacob's Fisher's Digest, 5069; 11 Johns. 128; 63 N. Y. 87; 43 id. 508; 1 Greenleaf, 234, § 163.) Testimony delivered in the presence of a party cannot be given against him as a tacit confession of the facts sworn to, though it be shown that he heard the testimony and expressed no dissent. (*Sheridan v. Small*, 2 Hill, 538.) The evidence of Bradley was properly excluded, the fact of the former trial not having been proved by record. (*Beals v. Guernsey*, 8 Johns. 464.)

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C. H. Roys for respondent. The trial court erred in excluding the testimony of the plaintiff's intestate, which had been given upon a former trial of this action. (Code of Civil Procedure, § 830; *White v. Kibling*, 11 Johns. 128.) The defendant cannot have advantage or benefit on account of his own or his attorney's omission to cross-examine the witness. (*Forrest v. Kissam*, 7 Hill, 470; *Comins v. Hatfield*, 12 Hun, 375.)

RAPALLO, J. We think that the minutes of the testimony of Bradley, the original plaintiff, given on the first trial of this action, should have been received as evidence on the second trial, he having died in the mean time. This kind of evidence was admissible at common law, on the grounds that it was not subject to the objection of being extra-judicial or without oath, and also that the party affected by it had the power to cross-examine. (1 Phil. Ev. 389, 400.) The common-law rule (in its application to parties examined as witnesses) has been incorporated into the Code (Code of Civil Procedure, § 830), which provides, "where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him."

In the present case the evidence was excluded on the grounds, as stated in the case, that the defendant did not cross-examine the witness on the former trial, and had no opportunity to do so. This we think was erroneous. The defendant had appeared by attorney in the action, issue had been joined therein, and this issue had been regularly brought on for trial at the Circuit on notice. The attorney for the defendant did not appear at the trial, and it proceeded as upon a default. No reason is shown why the defendant's attorney did not ap-

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pear, and it certainly was in his power to appear and cross-examine the witness. His failure to do so was a waiver of that privilege. The witness was also subject to be cross-examined by the court, in the absence of the defendant and his attorney. It also appeared that the defendant was present in court during the trial, but did not come forward to take part in the proceedings. This fact was met by an offer to prove that he was an habitual drunkard, unable to transact business; but all this part of the case may be disregarded, and the fact of the defendant's presence in court treated as of no importance, because he had an attorney in the action, whose duty it was to represent him on the trial, and who could not, by absenting himself, deprive the plaintiff of any of his rights. The witness was examined on a regular trial of the action. He was subject to cross-examination by the defendant's attorney, if he chose to exercise that right, or, in his absence, by the court, if it saw reason to scrutinize the testimony of the witness. The evidence is, therefore, brought within the principle of the common-law rule. But furthermore, the provision of the Code (§ 830) is explicit that where a party has died since the trial of an action, the testimony of the decedent, taken or read in evidence at the former trial, may be given in evidence at a new trial, by either party, subject to certain objections, etc., and it imposes no condition that the witness shall have been cross-examined, but requires only that the testimony shall have been taken upon a trial. It assumes that on every trial the opposing party has the power to cross-examine. If he does not choose to appear and exercise this power, the consequences should fall on him and not on his adversary. To deal otherwise with the matter would operate unjustly in the present and all other cases. Here as matter of favor, the defendant, notwithstanding his failure to appear at the trial, was allowed by the court to come in and defend, on payment of costs. Before the case was tried again the witness died, and if the defendant's contention should prevail, the result would be that by means of the defendant's own *laches*, and of the indulgence extended to him by the court,

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the plaintiff would lose the benefit of the testimony, which, as the defendant claims, is necessary to sustain the action.

The evidence on the part of the plaintiff was sufficient to establish *prima facie* that the defendant borrowed and received the merchandise in question, and did not return it. The sole ground upon which the nonsuit was ordered was that a demand of its return had not been proved. This proof would, it is claimed, have been supplied by the evidence which was rejected. The court at General Term held, and we think correctly, that the evidence should have been received, and awarded a new trial. The defendant has declined to avail himself of the opportunity to establish, on such new trial, any defense upon the merits, and has appealed from the order granting a new trial, giving the usual stipulation. Having chosen to rest his case upon this ground, we have no alternative but to affirm the order granting a new trial, and order judgment absolute against the defendant for the plaintiff's damages and costs.

All concur.

Order affirmed and judgment accordingly.

HARRIET E. WILLIS, as Administratrix, etc., Appellant, v.
SARAH J. SMYTH et al., Respondents.

U., plaintiff's intestate, in 1850 deposited a sum of money in a savings bank, which was credited to an account then opened with her, in trust for S. J. U., her daughter. The bank issued a pass-book, in which the account was entered, as with her, in trust for her said daughter. This deposit was subsequently drawn out. In 1874, U., having sold a house and lot, deposited \$2,000 to the credit of said account, which was entered in said pass-book. She also, at the same time, deposited \$25 to the credit of an account, with her in trust, for a grand-daughter, receiving another pass-book therefor, and on the same day she deposited the balance of the purchase-money received to her own credit, in another savings bank. U. retained the pass-book until her death. In an action to determine the title to the deposit, *held*, that the transaction disclosed an intention to

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create a trust for the benefit of the daughter; and that the latter was entitled to the fund.

Also *held*, the fact that prior to the second deposit the daughter was married, and so bore a different name, at that time, and that the name was not changed in the account, did not affect the question, as the deposit was clearly made for her benefit.

Also *held*, the fact that U. drew the interest on the deposit did not change or affect the character she had given to it as a trust fund; nor did the fact that she had offered to loan the money, after the deposit was made; or that she, in the first place, proposed to deposit the whole purchase-money in the bank where the balance was deposited.

(Argued January 23, 1883; decided February 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of October, 1881, which affirmed a judgment in favor of defendant Smyth, entered upon a decision of the court on trial without a jury.

This action was brought to determine the title to a deposit made by Clarinda P. Urner, plaintiff's intestate, with defendant the Seamen's Savings Bank of the city of New York. The court found substantially the following facts:

On the 28th of June, 1850, said Clarinda P. Urner, the mother of the defendant, Sarah J. Smyth (the said defendant then being a minor, and unmarried), opened an account with the said bank, and on that day deposited in said bank the sum of \$288, which account was headed:

"Clarinda P. Urner, in trust for Sarah J. Urner."

Said bank then duly issued its bank or pass-book with the following entry therein: "Clarinda P. Urner, in trust for Sarah J. Urner, in account with Seamen's Bank for Savings."

On the 11th day of December, 1874, said intestate, having on hand \$4,500, the proceeds of the sale of a house and lot, deposited the further sum of \$2,000 with the said bank, which deposit was entered in said pass-book. She at first intended to deposit the whole in the Bowery Savings Bank, but concluding not to risk the whole in that bank, made the deposit as stated and deposited the balance in the bank last

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named. Before said deposit the said Sarah J. Urner intermarried with one Alexander Smyth.

It appeared that when the deposit in question was made she deposited in the same bank \$25 in trust for a grand-daughter, opening this account also in her own name as trustee, and receiving a pass-book therefor. It also appeared that prior to the time of such deposit nearly all of the first deposit, with interest, had been drawn out by intestate, and that the balance, with the interest on the \$2,000 up to the January preceding her death, was drawn out by her.

A. H. Hitchcock for appellant. A deposit of the character of the one in suit is not a sufficient declaration in trust, and did not pass the title to the fund. (*Young v. Young*, 80 N. Y. 438; *Boone v. Citizens' Bk.*, 84 id. 83.)

Alfred Steckler for respondent. Plaintiff's intestate by her acts constituted herself a trustee of the fund for the benefit of respondent. (*Martin v. Funk*, 75 N. Y. 134; *Wetzel v. Chapin*, 3 Bradf. 386; *Millsbaugh v. Putnam*, 16 Abb. Pr. 380; *Smith v. Lee*, 2 N. Y. Sup. Ct. 591; *Minor v. Rogers*, 40 Conn. 512; *Exton v. Scott*, 6 Simons, 31; *Fletcher v. Fletcher*, 4 Hare, 67; *Sowerlyer v. Arden*, 1 Johns. Ch. 240; *Brum v. Winthrop*, id. 329; *Grangial v. Arden*, 10 Johns. 295; *Doty v. Willson*, 47 N. Y. 580.) The ownership and the right to the possession of the pass-book followed the ownership of the money. The book was not the property, but only the voucher for the property which after the deposit consisted of the debt against the bank. (*Martin v. Funk*, 75 N. Y. 134-142; *Young v. Young*, 80 id. 422; *Heartley v. Nicholas*, 44 L. J. Ch. App. [N. S.] 277.)

MILLER, J. We concur with the opinion of the General Term that it is difficult to distinguish any difference of a material character between the circumstances arising in this case and those presented in the case of *Martin v. Funk* (75 N. Y. 134). The opinion of the court in that case seems to cover the

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question which is presented in this case, and the decision here might well rest upon the authority of the case cited without comment. The counsel for the appellant claims that a distinction exists between that case and the one at bar, and that only a single question was there raised, which was that the retention of the pass-book was inconsistent with the declarations contained in it. We cannot concur in this view, and we think that in both cases there was abundant evidence to indicate the intention of making a trust for the benefit of the parties named. Certainly the discussion in the opinion of CHURCH, Ch. J., in *Martin v. Funk* fully covers the principle involved in the question which is here presented, and it would be extremely difficult to discriminate so as to hold that a distinction exists between the two cases which renders the one cited inapplicable to this one. Such being the case we think the authority of the case cited is controlling and decisive.

It is very apparent that the intestate intended to make the deposit for the benefit of her daughter therein named. The language employed bears the strongest evidence of such an intention, and this seems to be supported by all the surrounding circumstances of the case; the beneficiary had been unfortunate and her mother clearly designed to make some provision which would inure to her benefit, and hence made the deposit in question in the form presented. It is true that originally a small sum had been deposited which had been subsequently drawn out, but the account was still continued in the same name and for the same evident purpose.

It appears that the intestate, on the same day as the deposit in question, had made another deposit in another bank to her individual account for the sum of \$2,500, which was a portion of the avails of a sale of real estate which she had made. She also deposited on the same day in the same bank where the \$2,000 in question, which also constituted a portion of the avails of the said sale, was deposited \$25, which was credited in another book, and which was stated to be in trust for a grandchild, being the daughter of the plaintiff. These circumstances bear on their face the strongest indications of an entire ap-

prehension on the part of the intestate of the nature of the business she was transacting and her intention to make separate deposits of the funds she had received, for the benefit of different persons, including the defendant Smyth. Nothing could be clearer or more conclusive as to her object and the purpose which she had in view. Retention of the bank-book by her for a number of years, within the case cited *supra*, must be regarded as showing that she kept it as trustee and in no other capacity, nor does the fact of her drawing the interest detract from the character in which she held the deposit as trustee. She may not have been aware that she had no right to draw from the trust fund, but that fact would not take away the character which she had given to that fund. She also had another bank-book, of the same bank in which she deposited the \$2,000 in question, containing her individual account, against which she was in the habit of drawing funds. The counsel for the appellant claims that the Special and General Terms overlooked the finding that the intestate had intended to deposit the whole of the money received by her, from the sale of real estate, in the Bowery Savings Bank, but unwilling to risk it all in that bank, she deposited \$2,500 there, and \$2,000, being the deposit in question, in the Seamen's Bank of Savings, the defendant corporation. We are unable to perceive how this finding can affect or impair a trust that was created by the deposit of the money in question in the form in which it was entered in the pass-book, and we think this fact does not in any way impair or affect the character which was impressed upon the deposit by the language employed in entering the same upon the book.

The point is also made that there was no person named Sarah J. Urner, the *cestui que trust* named in the pass-book, at the time the deposit of \$2,000 was made, for the reason that the Sarah J. Urner originally named had been married before the last deposit was made, and that her name at that time was Smyth. We think this position not well founded. It is manifest that the deposit was made, for the benefit of the intestate's daughter originally and continued so after her marriage. It

was designed for the daughter alone, as the circumstances show, being kept separate from other deposits which the intestate had made in the same bank and elsewhere. It, therefore, cannot be said it was created for herself or any one else than her daughter, and it is enough that the daughter can properly be designated as the person named, although married and bearing a different name. Her marriage could not change the nature of the deposit or the intention of the intestate to make it for her daughter's benefit.

It is difficult to see how the intestate's administratrix can recover this money which was deposited in the name and for the advantage of another person, or how any other person than the one evidently intended has any claim whatever to the same.

The evidence that the intestate offered to loan the money to her son-in-law does not deteriorate from or destroy the character of the trust which was created by the deposit.

It is enough to say that she did not loan the money, but allowed it to remain in the form it had been originally entered. Nor can it, we think, be urged that the fact that she did not change the deposit to the name of her daughter after her marriage indicated an intention that she did not intend this as a trust for the benefit of her said daughter. If she had any intention of changing it she should have manifested it in some different manner. It is very clear there was an evident intention on the part of the deceased to create a trust for the benefit of her daughter, and we are unable to see any ground upon which that intention can be subverted.

In our opinion the judgment was right and should be affirmed.

All concur.

Judgment affirmed.

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MARY E. McGUIRE, by Guardian, etc., Respondent, v. WILLIAM SPENCE, Appellant.

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One passing along a sidewalk has a right to presume it to be safe, he is bound to no special care and cannot be charged with negligence for not being on his guard against an unlawful obstruction, or for not looking for it, although it is visible.

Where a child is injured in consequence of such an obstruction, it is not a defense that the child was playing upon the street, instead of using it for the ordinary purposes of travel; for children to play upon a sidewalk is not unlawful, wrong or negligent.

In an action to recover damages for injuries caused by falling into an uncovered area in the sidewalk in front of defendant's premises, he claimed that the premises were, at the time of the accident, leased to and in the possession of one L. It was proved on the part of plaintiff that the purchases made by L. were charged to defendant. The latter as a witness, in his own behalf, was asked "why were the goods charged to you?" This was objected to and excluded. *Held* no error.

(Argued January 24, 1883; decided February 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 13, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries received by plaintiff in consequence of falling into an open area in the sidewalk in front of plaintiff's premises.

The facts so far as material are stated in the opinion.

A. Simis, Jr., for appellant. The plaintiff, at the time of the accident, was of an age when the law presumes her capable of exercising care and discretion. (Shearm. & Redf. on Neg., § 50.) It was incumbent upon her to show affirmatively that she was free from all fault which contributed to the injury. Absence of negligence will never be presumed. (*Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Cordell v. N. Y. & H. R. R. Co.*, 75 id. 330; *Warner v. N. Y. C. R. R. Co.*, 44 id. 471; *Riceman v. Havemeyer*, 84 id. 647.) If the plaintiff's failure to look where she was walking contributed to

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the injury, she has no right of recovery. (*Barker v. Savage*, 45 N. Y. 191; *Burke v. B. S. A. R. R. Co.*, 49 Barb. 529; *Arvings v. Jones*, 9 Md. 109; *Dobiecki v. Sharp*, 88 N. Y. 203; *Watkins v. G. W. R. R. Co.*, 37 L. T. [N. S.] 193.) Defendant was under no duty or obligation to the plaintiff to have the area covered. (*McAlpin v. Powell*, 70 N. Y. 126; *Blodgett v. City of Boston*, 8 Allen, 237; *Stinson v. Gardner*, 42 Me. 248; *McCarty v. City of Portland*, 47 id. 167; *Hatfield v. Roper*, 21 Wend. 614.) It was error to deny defendant's motion to dismiss the complaint on the ground that, at the time of the accident, the premises were in possession of a tenant. (*Clancy v. Byrne*, 56 N. Y. 133; *Swords v. Edgar*, 59 id. 28.) The excavation was not a nuisance, because the defendant had a permit from the authorities to place it there. (*Davis v. The Mayor*, 14 N. Y. 506; *Masterson v. Short*, 7 Robt. 241.)

Thomas E. Pearsall for respondent. The defendant, having constructed the opening in the highway for the benefit of his adjoining premises, was bound to restore the highway in as safe a condition as it was before making such opening, and he is liable for injuries sustained by the plaintiff by reason of her falling therein, irrespective of the question of negligence on her part. (*Clifford v. Dam*, 81 N. Y. 52; *Irvine v. Wood*, 51 id. 224; *Swords v. Edgar*, 59 id. 33; *Congreve v. Smith*, 18 id. 83; *Davenport v. Ruckman*, 37 id. 568; *Osborne v. U. F. Co.*, 53 Barb. 641; *Anderson v. Dickie*, 1 Robt. 238; *Whalen v. Gloucester*, 68 N. Y. 283; *Mullaney v. Spence*, 15 Abb. [N. S.] 319.) An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care and prudence which can reasonably be expected of one of its age. (*Byrne v. N. Y. C. & H. R. R. R. Co.*, 83 N. Y. 620; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 252; *Sheridan v. B. & N. R. R. Co.*, 36 id. 42; *O'Mara v. H. R. R. Co.*, 38 id. 445; *Mowrey v. C. C. R. R. Co.*, 51 id. 666; *Thurber v. Harlem & C. R. R. Co.*, 60 id. 336; *McGarry v. Loomis*, 63 id. 107; *Fallon v. C. P. & C. R. R. Co.*, 64 id. 13; *Mc*

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Gevern v. N. Y. C. & H. R. R. Co., 67 id. 417; *Haycraft v. L. S. & M. S. R. R. Co.*, 64 id. 636; *R. R. Co. v. Stout*, 17 Wall. 657; *Casey v. N. Y. C. R. R. Co.*, 6 Abb. N. C. 104.) The fact of the plaintiff playing on the sidewalk does not constitute contributory negligence. She had a right to be on the sidewalk and to play thereon. (*McGarry v. Loomis*, 63 N. Y. 104, 108.) Whether the plaintiff was guilty of contributory negligence was a question of fact. (*Hart v. H. R. R. Co.*, 80 N. Y. 622; *Weed v. Ballston Spa*, 76 id. 329; *Driscoll v. Mayor*, 11 Hun, 101; *Monell v. Peck*, 88 N. Y. 398, 403.)

FINCH, J. The plaintiff was injured by falling into an uncovered area in the sidewalk of a street in the city of Brooklyn, fronting upon premises owned by the defendant. She had returned from school, and observing other children playing on the opposite side of the street, crossed over and joined them in their amusement of jumping the rope, and while so engaged fell into the open area. She was about fourteen years of age; the dangerous hole was visible to one who looked; and the accident happened in the day-time. But the jury found she was not guilty of contributory negligence, and the facts warranted such a finding. Even if the burden rested upon her of showing that her own fault did not contribute to the injury, which we do not hold, but which the trial judge seems to have charged (*Clifford v. Dam*, 81 N. Y. 52; *Irvine v. Wood*, 51 id. 224; 10 Am. Rep. 603), she bore that burden successfully. For negligence is a relative term, and depends upon the degree of care necessary in a given case. He who approaches a railroad crossing approaches a place of danger, and he must look and listen, for he is bound to anticipate a possible harm. But one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard. Whoever left this area in the sidewalk open and uncovered was guilty of a positive wrong. It amounted to an obstruction of the street. It was a

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trap set for the unwary, or for those hurried or inattentive. Nobody was bound to anticipate its existence, or to look for it, although it was visible. The plaintiff, therefore, was bound to no special care to avoid such an accident as happened, and the jury were justified on the facts in finding her free from negligence.

Nor does it change the result that she was playing upon the sidewalk instead of using it for the ordinary purposes of travel. Our attention is called to certain cases in other States as authority for the doctrine that only those using the streets for their appropriate and normal purpose are within the rule of protection. (*Blodgett v. City of Boston*, 8 Allen, 237; *Stinson v. Gardiner*, 42 Me. 248; *McCarthy v. City of Portland*, 67 id. 167; 24 Am. Rep. 23.) In these cases the actions were against municipal corporations under statutes which bound them to keep the streets safe and convenient for travelers, and a just construction of the written law furnished the limitation of the corporate duty. In this State we have held that the duty exists not merely as to travelers, but as to all persons lawfully in the streets, and have imposed upon a city a liability for negligence where the person injured was in no sense a traveler, but engaged in excavating the street under lawful permission, but for the benefit of a private corporation. (*Rehberg v. The Mayor*, Jan. 23 1883.*) This plaintiff was lawfully in the street. She had a right to be there, and while there, not to be exposed to the possible dangers of an uncovered opening in the sidewalk. Nor does it matter that she was at play with other children. In *McGarry v. Loomis* (63 N. Y. 108; 20 Am. Rep. 510), we stated it as a proposition too plain for comment that "it is not unlawful, wrong or negligent for children on the sidewalk to play."

A further ground of defense was argued, based upon the alleged existence of a tenancy. The defendant was the owner of the premises, and claimed to have leased them to one Livingston, who was in possession at the time of the accident, and

* *Ante*, p. 187.

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alleged to be alone responsible for the uncovered area. But upon the facts in this connection two questions were specially submitted to the jury. They were asked to say whether the premises at the time of the accident were occupied by the defendant, and to this they answered in the affirmative. They were further requested to say whether the area was covered and safe when the tenant took possession, and to this they replied in the negative. There was evidence to sustain this verdict upon both propositions. While the owner and Livingston both swore to the tenancy, the former said the tenant at the time of the accident was Mary Livingston, and then that it was Andrew Livingston; and it was shown that the latter's purchases were charged to and paid for by the defendant, and that bills were made out in his name for work done by Livingston. There was also evidence that the area was left unguarded for some time before the tenancy, and Livingston himself swore that he replaced the wooden slats which served as a cover many times, and the expense of such repairs was always paid by the defendant. There was quite enough in these facts to fix his liability.

Upon the subject of this alleged tenancy a question was asked the defendant: "Why were the goods charged to you?" This was excluded by the court, and that exclusion is claimed to have been an error. Undoubtedly the witness had a right to explain the facts proven by his adversary as to his connection with Livingston's business, as bearing on the question of tenancy and possession. But permission to do that was nowhere refused. On the contrary, the witness did explain so far as he chose. He testified that the bills made out in his name were made out without his knowledge or assent. The question asked was objectionable because it sought his opinion of the reasons or motives of third persons for charging to him goods delivered to Livingston. Their motives were immaterial. His dealings with the tenant and the real relation existing between them were not excluded, but freely opened to inquiry.

We have examined the requests to charge which were refused by the court and find no error in the refusals. The

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judgment was reasonable in amount and seems to us just. It should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN G. FARNSWORTH, as Receiver, etc., Respondent, v. DARIUS S. WOOD et al., Appellants.

The same Respondent v. S. FOSTER DEWEY, Impleaded, etc., Appellant.

The same Respondent v. RICHARD T. WILSON et al., Appellants.

A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act (§ 10, chap. 40, Laws of 1848) to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself, or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by these in their own right and for their own especial benefit.

Story v. Furman (25 N. Y. 214), distinguished.

(Argued January 29, 1883; decided February 6, 1883.)

THESE were appeals from judgments of the General Term of the Supreme Court in the third judicial department, entered upon orders made September 24, 1880, which affirmed judgments in favor of plaintiff, entered upon orders overruling demurrers to the complaints in the actions above entitled.

These actions were brought by plaintiff as receiver of the Eagle Mowing and Reaping Machine Company, a manufacturing corporation organized under the General Manufacturing Act, to enforce the liability imposed by said act (§ 10) upon stockholders in favor of creditors.

Abram Lansing for Woodward *et al.*, appellants. If the plaintiff can maintain this action at all, it is because this liability of the stockholders is, by the operation of the statute, or through

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the alleged authorization of the Supreme Court, practically vested in him as his property in trust. (2 R. S. 463, § 36, part 3, chap. 8, title 4, art. 2; Laws of 1860, chap. 403, p. 699; 2 R. S. 469, § 67, part 3, chap. 8, title 4, art. 3; Code of Civil Procedure, § 1788, as amended by chap. 399, Laws of 1882, p. 566; *Owen v. Smith*, 31 Barb. 641; *Porter v. Williams*, 5 How. Pr. 441; *S. C.*, 9 N. Y. 142; *Albany City B'k v. Schermerhorn*, 1 Clarke's Ch. 297; *Iddings v. Bruen*, 4 Sandf. Ch. 424; *Bostwick v. Menck*, 40 N. Y. 383.) This liability of the stockholders is given by the statute expressly to the creditors. (Laws of 1848, chap. 40, § 10.) The liability was, therefore, primarily the property of the creditors. They might control it; they might transmit it to their personal representatives; they might assign it *inter vivos*. (*Pfohl v. Simpson*, 74 N. Y. 137; *Weeks v. Love*, 50 id. 568; *Corning v. McCullough*, 1 id. 47; *Zabriskie v. Smith*, 13 id. 322.) Rights of property under the Constitution are absolute and comprehensive, and exclude all control, occupation and interference of the State, as well as of individuals. (Const., art. 1, § 6; *Wynhaemer v. The People*, 13 N. Y. 378; *Story's Eq. Pl.*, § 72.) A right of action, given by statute to a creditor against the stockholders of a corporation, cannot be taken away from its owner, either at law or in equity, without giving him at least a day in court, whereon he may show cause against the right to take it, as well as against the propriety or justice of its exercise. (*Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Gibion v. Martine*, 8 id. 481; *Sanford v. Sinclair*, id. 375; *Fields v. Ripley*, 20 How. Pr. 26; *Kemp v. Harding*, 4 id. 179, 180; *People v. A. & S. R. R. Co.*, 1 Lans. 330; *Bowery S'vs B'k v. Richards*, 3 Hun, 366; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Porter v. Williams*, 9 N. Y. 142; *Salter v. Tobias*, 3 Paige, 339.) The plaintiff cannot make title, as against the creditor, under any provision of the act through which he claims his appointment. (*Curtis v. Leavitt*, 15 N. Y. 44; *Story v. Furman*, 25 id. 220; *Hyde v. Lynde*, 4 id. 392; 2 R. S. 463, § 36, part 3, chap. 8, title 4, art. 2; Laws of 1860, § 403, p. 699.) There is nothing in the provisions of article 3, title 4, chapter 8, part

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3, Revised Statutes, under which, by chapter 71, Laws of 1852, and chapter 403, Laws of 1860, the receiver's powers are enlarged, which gives him authority over such a fund. (2 R. S. 469, § 67, art. 3, title 4, chap 8; id., title 1, part 2, chap. 5, art. 8; 1 R. S. [2 R. S. 40]; id., § 7 [2 R. S. 41]; 2 R. S. 21, title 1, part 2, chap. 5, art. 3, § 28; id., art. 4, § 22 [2 R. S. 28]; id., art. 5, § 9 [2 R. S. 30]; id., art. 6, §§ 9, 14 [2 R. S. 32].) This liability of the stockholders to the creditors is not an asset of the corporation in any ordinary or general sense. (Laws of 1848, chap. 40, §§ 10, 24.) The receiver represents the creditors, in so far as they are interested in corporate property; he cannot represent them, and is not their trustee in any general sense, or in any sense which gives control of their general property. (*Ruggles v. Brock*, 6 Hun, 164; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283; *Osgood v. Layton*, 1 id. 1; *Gillet v. Moody*, 3 N. Y. 479.) The plaintiffs' allegation, that he has been duly empowered by an order of the Supreme Court to commence this action, is no foundation for a title to the cause of action. (1 Story's Eq. Jur., § 64.) The creditors must be made parties to the suit, because it is necessary to enjoin the prosecution of their claims. (*Burr v. Wilcox*, 22 N. Y. 551, 557; *Mathez v. Neidig*, 72 id. 101; *Moss v. Oakley*, 2 Hill, 265; *Weeks v. Love*, 50 N. Y. 568; *Pfohl v. Simpson*, 74 id. 137; Code of Civil Pro., §§ 602, 603, 604; *Sage v. Quay*, Clarke's Ch. 347; *Matter of Horning*, 2 Paige, 315; *Watson v. Fuller*, 9 How. Pr. 425; *Rorke v. Russell*, 2 Lans. 244; *Story v. Furman*, 25 N. Y. 214, 231; *Calkins v. Atkinson*, 2 Lans. 12; *Fellows v. Fellows*, 4 Johns. Ch. 25; 2 R. S. 464, part 3, chap. 8, art. 2, title 4, §§ 43, 44, 45; id. 462, chap. 8, art. 2, title 4, § 36; id., art. 3, §§ 67, 68, 69, 71.) In the suit at bar an injunction cannot issue against the creditors before decree or after. (*McKensie v. L'Amoreaux*, 11 Barb. 516; *Pfohl v. Simpson*, 74 N. Y. 137; *Kerr v. Blodgett*, 48 id. 62; *Reed v. The Evergreens*, 21 How. Pr. 319; *Garner v. Wright*, 24 id. 144; *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 516; Story's Eq. Pl., §§ 101, 102; *Hubbard v. Somer*,

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22 Barb. 601; *Habricht v. Pemberton*, 4 Sandf. 657, 659; *Duffy v. Duncan*, 22 Barb. 588; *Hammond v. Earle*, 5 Abb. N. O. 102.) Neither can the plaintiff claim to sue alone as the trustee of an express trust. (Code of Civ. Pro., § 449.) Equity will not appoint a receiver for the purpose of accomplishing that which the person applying may do for himself or because it can do no harm. (*Sollory v. Leaver*, L. R., 9 Eq. Cas. 22; *Cory v. Long*, 12 Abb. Pr. [N. S.] 434; *Orphan Asylum v. McCartee*, Hopk. Ch. 435; *Pfohl v. Simpson*, 74 N. Y. 137; *Weeks v. Love*, 50 id. 568; *Sollory v. Leaver*, L. R., 9 Eq. Cas. 22, 25; *Buxton v. Monkhouse*, 2 Geo. Cooper, 41; *Willis v. Corlies*, 2 Edw. Ch. 286, 287; *Verplanck v. Caines*, 1 Johns. Ch. 58.)

Willard Bartlett for S. Foster Dewey, appellant. The plaintiff has not legal capacity to sue, because the law does not authorize a receiver, however appointed, to bring a suit of this kind. (3 Edm. 735; 2 R. S. [8th ed.] 504; Thompson on Liability of Stockholders, § 342; *Dutcher v. Marine Nat. B'k*, 12 Blatchf. 435; *Bristow v. Sandford*, id. 341; Laws of 1852, chap. 71; Laws of 1860, chap. 403; 3 Gen. Stats. [Edm. 2d ed.] 682; *Walker v. Crain*, 17 Barb. 123.) The court cannot determine the controversy as between the parties brought before it by the complaint without prejudice to the rights of these creditors. They must, therefore, be brought in. (Code of Civ. Pro., § 452.) The complaint does not state facts sufficient to constitute a cause of action. (*Weeks v. Love*, 50 N. Y. 571.)

Joseph H. Choate for R. T. Wilson et al., appellants. The liability of stockholders under section 10 of chapter 40, Laws of 1848, was never, in any sense, property of the corporation. Plaintiff, as receiver, took only the property, things in action, and effects of the corporation, and, therefore, cannot maintain this action. (2 R. S. 463, § 36; Laws 1852, chap. 71, p. 67; 2 R. S. 469, § 69; 3 R. S. 723, § 7; High on Receivers, § 205 and note; Thompson's Liability of Stockholders, § 342; *Hanson v. Donkersley*, 37 Mich. 184; *Wright v. McCormack*, 17 Ohio

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St. 86; *Umsted v. Buskirk*, id. 113; *Dutcher v. Marine Nat. B'k*, 12 Blatchf. 435; *Bristol v. Sanford*, id. 341; *Calkins v. Atkinson*, 2 Lans. 12; *Osgood v. Laytin*, 3 Keyes, 521; *Weeks v. Love*, 50 N. Y. 571; *Pfohl v. Simpson*, 74 id. 137.)

S. W. Rosendale for respondent. The liability of stockholders for the debts of a corporation is in the nature of a partnership liability, and not in the nature of a penalty or forfeiture created by statute, and forms, substantially, a fund for the payment of the debts, so far as it will go, of the corporation. (*Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 id. 224; *Mathez v. Neidig*, 72 id. 100, 101; *Weeks v. Love*, 50 id. 568, 571; *Bailey v. Bancker*, 3 Hill, 188; *Ross v. Oakley*, 2 id. 265; *Aspinwall v. Sacchi*, 57 N. Y. 335; *Cuykendall v. Niles*, 26 Alb. L. J. 7.) A receiver of a corporation can maintain, upon the above principle, an action against the stockholders to enforce this liability, though the corporation could not, for it is a liability to the creditors, which the stockholders are under, and the creditors, as well as the corporation, are represented by the receiver. (*Ruggles v. Brock*, 6 Hun, 164; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283; *Osgood v. Laytin*, 5 Abb. Pr. [N. S.] 1-10; 3 R. S. [6th ed.] 748, § 36; id. 754, § 82; *Libby v. Rosekrans*, 55 Barba 202; *Osgood v. Ogden*, 3 Abb. Ct. of App. Dec. 425; *Gillett v. Moody*, 3 N. Y. 479; *Att'y-Gen. v. Ins. Co.*, 77 id. 272.) The principal importance of section 69 (2 R. S. 469) seems to be to state that the action need not be brought against such stockholder if he be insolvent. (*Nathan v. Witlock*, 9 Paige, 152; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 id. 9; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, id. 65.) The liability of the stockholders to creditors may be just as promptly, and just as properly enforced by the receiver, as trustee for the creditors, as by the creditors themselves. (*Story v. Furman*, 25 N. Y. 214, 231; *Calkins v. Atkinson*, 2 Lans. 12; *Weeks v. Love*, 50 N. Y. 568.) The creditors of the corporation, either residents or not, or both, are not necessary

parties in the first instance, either as plaintiffs or defendants in this action. (74 N. Y. 138; 3 R. S. [6th ed.] 37, § 10, subd. 3; *Thompson v. Brown*, 4 Johns. Ch. 619, 641; *Travers v. Myers*, 67 N. Y. 542; *In re Att'y-Gen. v. Guard L. Ins. Co.*, 77 id. 272; *Kerr v. Blodgett*, 48 id. 62.) It is only proper to make creditors parties in the first instance, who have already commenced, or threaten to commence, suits in their own name against stockholders. (*Osgood v. Laytin*, 5 Abb. [N. S.] 1-11.) It is sufficient to allege that a receiver was duly appointed. (*Manley v. Rossiga*, 13 Hun, 288; *Rockwell v. Fasset*, 45 N. Y. 166.)

RAPALLO, J. We are of opinion that these actions cannot be maintained. The plaintiff is the receiver of a corporation created under the General Manufacturing Law of 1848, appointed upon the sequestration of its property on the return of an execution, and seeks by this action to enforce against the stockholders, the personal liability to creditors which is imposed by that act upon stockholders in such corporations.

The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions. It is not a general right, but one which attaches to the particular creditors only who are within the conditions, and is to be enforced by these in their own right and for their own special benefit. The receiver in this case is not vested with the rights of action of these creditors, but only with the property which was sequestered under the provisions of section 36, chapter 8, title 4, article 2 of the Revised Statutes, viz.: "the stock, property, things in action and effects of the corporation." The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, nor rights of action vested in it, nor is there any provision of the statute, which transfers these rights of action from the creditors to the receiver.

The case of *Story v. Furman* (25 N. Y. 214) has no applica-

tion to this case. That action was brought by a receiver appointed under a special act passed in 1852, for the dissolution of manufacturing corporations in Herkimer county, organized under the Manufacturing Law of 1811. It was known as the Herkimer County Act, and in express terms vested not only the corporate property, but the right to enforce the liability of stockholders for the corporate debts, in the trustees, or the receiver appointed in their place, as trustees for the creditors, and authorized them to make assessments upon the stockholders and collect them, and distribute the proceeds ratably among all the creditors. That act referred to the liability imposed by the act of 1811, which was an absolute liability to the extent of the amount of their stock, to pay all the debts of the company existing at the time of the dissolution. The machinery provided was appropriate to the enforcement of such a liability. But it was a very different liability from that imposed by the act of 1848. The case of *Story v. Furman* (*supra*) is commented upon in the late case of *Cuykendall v. Corning* (88 N. Y. 129), and it is there held that the machinery for enforcing the liability of stockholders through a receiver by assessment, etc., provided by the Herkimer County Act, is inapplicable to corporations organized under the act of 1848.

The liability of stockholders under the act of 1848 is a several individual liability of each stockholder, directly to such of the creditors as have complied with the requisite conditions precedent. There is no statutory provision by which the rights of such creditors can be vested in a receiver of the corporation. Section 448 of the Code of Civil Procedure empowers one or more of the creditors to sue in behalf of all who are similarly situated and enjoin separate suits. This provision recognizes that the right of action is in the creditors, and is the only one by which any creditor can be enjoined from bringing his separate action.

The judgments should be reversed and judgment rendered for the defendants, on the demurrer, with costs.

All concur.

Judgments reversed.

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WILLIAM MILLER, Appellant, v. CHRISTINA MILLER et al.,
Respondents.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit.

Plaintiff was born illegitimately in Wurtemberg, in 1845, where his parents then resided; they removed, with plaintiff, to the State of Pennsylvania, and his father there became a naturalized citizen. In 1853, while domiciled in said State, the parents were married. In 1857 a law was passed by the legislature of that State, legitimatizing children, born out of wedlock, of parents who shall thereafter marry, which act, by an act of 1858, was made applicable to all cases arising prior to 1857, save where some interest had become vested. In 1862 plaintiff removed, with his parents, to this State; his father thereafter became owner of certain real estate, and in 1875 died seized thereof, and intestate. In an action of ejectment *held*, that the provision of the Revised Statutes (1 R. S. 754, § 19) disinheriting illegitimate children did not apply; and that plaintiff was entitled to inherit equally with the children of the deceased born in wedlock.

Birtchistle v. Vardill (11 Eng. Com. Law, 266), *S. C.* (2 C. & F. 581; 7 id. 895), *Smith v. Dorr's Admrs.* (34 Penn. St. 126), distinguished.
Lingen v. Lingen (45 Ala. 410), disapproved.

(Argued December 13, 1883; decided February 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 19, 1880, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

This was an action of ejectment.

The material facts are stated in the opinion.

Robert Stephens for appellant. Plaintiff was made legitimate by the marriage of his parents in Pennsylvania in 1853. (Brightley's Purdon's Digest [ed. 1873], 1004, § 9.) Being thus legitimate, he did not cease to be so when he put his foot upon the soil of New York. (Blackstone, 4 Inst. 36.) The personal status of legitimacy given to the plaintiff, by the

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laws of Pennsylvania, accompanied him wherever he went. (*Barrero v. Alpuente*, 6 La. [N. S.] 69; Story on Conflict of Laws, §§ 87a, note 3, 93, 93b, 93d, 93-107; Wheaton's Law of Nations, 172; Statute of Merton, 20 Hen. 3, chap. 9; 2 Cl. & Fin. 576, 589; 7 id. 915; Wharton's Conflict of Laws, § 241; Int. Law, IV, 363; 2 Parsons on Contracts, 800.) The principle that the status or condition of legitimacy must be determined by the law of the country where such status had its origin is well settled. (*Smith v. Kelly's Heirs*, 23 Miss. 170; *Scott v. Key*, 11 La. Ann. 232; *Ross v. Ross*, 129 Mass. 243; *Goodman's Trust*, Law Reports, Div., 1 Chancery, 1881 [part 7, July 1], Vol. 17, p. 266; *Van Voorhees v. Brintnall*, 86 N. Y. 18.)

John A. Reynolds for respondents. The title and disposition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass. (18 Pick. 245, 247; 10 Wheat. 202; 3 McLean, 399; 46 N. Y. 144; 9 Wall. 27; *Brine v. H. F. Ins. Co.*, 6 N. Y. W'kly Dig. 568.) No person can acquire real estate whom the *lex rei sitæ* does not recognize for the purpose. (Wharton on Priv. Inter. Law, § 296; Story on Conflict of Laws, §§ 430, 434, 483, 484; *McCormick v. Sturdivant*, 10 Wheat. 202; *Fenton v. Livingstone*, 3 McQ. 497, 549; *Bonate v. Welch*, 24 N. Y. 157, 164; *U. S. v. Fox*, N. Y. W'kly Dig., May 14, 1877, 335; *Miller v. Miller*, 18 Hun, 507.) Children and relatives who are illegitimate shall not be entitled to inherit from their fathers, etc., under any of the provisions of the Statute of Descent of this State. (2 R. S. [Banks' 6th ed.] 1135, § 19.) Our Revised Statutes continue the rule of the English common law, except when the same is expressly contravened thereby. (Constitution of N. Y., art. 1, § 17; 1 Kent [Holmes' ed.], § 342; 4 id., § 414 and notes; 2 C. & F. 593.) The fact of the plaintiff's birth out of lawful wedlock, arbitrarily and alone, determines his illegitimacy for the purpose of inheriting real estate in this State, independently of the facts where he was born, or the domicile of him-

Opinion of the Court, per MILLER, J.

self or father, at the time of his birth, and such illegitimacy can never be removed. (*Birtwhistle v. Vardill*, 7 C. & F. 895; Bingham on Descent, 472; *Fenton v. Livingstone*, 3 Macquean, 497, 549; *In re Dow's Estate*, 4 Drewry, 194-198; 1 R. S. 641; 2 Kent's Com. 208, 209; 1 Black. Com. 454, 455.) There is no distinction in law between an illegitimate child and a bastard. (2 Kent [Holmes' 12th ed.], 209; 1 Black. [Wend. ed.] 454; Wharton's Priv. Inter. Law, §§ 296-335; Story on Conflict of Laws, § 427, note 1, § 576; *Birtwhistle v. Vardill*, 7 C. & F. 895, 825, Bingham on Descent, 471; *Smith v. Derr's Adm'rs*, 34 Penn. St. 126; Savigny's Priv. Inter. Law, 33, 34, 264; 4 Kent [Holmes' ed.], 414 and notes; *Smith v. Kelly*, 33 Miss. 167; *People v. Baker*, 76 N. Y. 88; *Ross v. Ross*, 129 Mass. 243, 247, 249; *Goodman's Trust*, Law Rep. Div. 1, Ch., July, 1881, part 7, vol. 17, p. 266.)

MILLER, J. By the statute of this State the real estate of an intestate passes in the first instance to his lineal descendants. (1 R. S. 751, §§ 1 and 2.) It is also provided that "children and relatives who are illegitimate shall not be entitled to inherit." (1 R. S. 754, § 19.) The plaintiff is a child of the deceased under whom he claims and one of his lineal descendants. He was born in the kingdom of Wurtemberg in the year 1845, before the marriage of his parents, and the question to be determined is whether he was legitimate at the time of the death of his father. At the time of his birth his father and mother were domiciled and resided at Wurtemberg. A statute found in the Laws of 1610 of that kingdom at title 17, § 4, is as follows: "Whatever is decreed in the foregoing title regarding the inheritance of children born in lawful wedlock shall be applicable also to such children as are begotten of two persons unmarried (but not too closely related for their betrothal or lawful conjugal cohabitation) and who first became legitimate by a subsequent marriage of their parents, shall be held equal to those children who are born in lawful wedlock as regards the right of inheritance from its parents, brothers and sisters and other relatives as in all other respects." Any

subsequent marriage of the parents of the plaintiff would, therefore, render him legitimate at the place of his birth and the domicile of himself and parents — Wurtemberg, and if the father had resided at Wurtemberg at the time of his decease, plaintiff would have been one of his lawful descendants, the same as though he had been born in wedlock.

The plaintiff with his parents subsequently removed to the State of Pennsylvania, and his father became a citizen of the United States by naturalization, and while domiciled there and in the year 1853 his parents were lawfully married. In 1862 the family removed to this State, where they lived until the death of the father in 1875. The real estate in question was purchased by plaintiff's father after his removal to this State and he owned the same in fee at the time of his death.

We think that by the law of the domicile of the plaintiff's birth, Wurtemberg, and by the subsequent marriage of his parents, the plaintiff was legitimated in the State of Pennsylvania. Be that as it may, however, in the year 1857 a law was passed by the legislature of the State of Pennsylvania which declared that: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents." (See Brightley's Purdon's Digest [ed. 1873], 1004, § 9.) The above act was followed by an act passed in 1858, by which the provision cited was made applicable to all cases arising prior to 1857, unless some interest had become vested. As the real estate which is the subject of this controversy had not been acquired prior to the acts referred to, no vested interest existed which conflicted with the acts cited. It is very evident that the plaintiff after the passage of the above laws was a legitimate child and entitled to all the rights and privileges of a lineal descendant of his parents. If his father had died in the State of Pennsylvania seized of real estate it cannot be questioned that any doubt would arise in regard to his claim thereto. He was invested with all the

rights of a citizen entitled to inherit such portion of his father's estate as the law allowed to legitimate children. Occupying this position can it be said that the plaintiff lost such right because his father moved out of the State of Pennsylvania and located in the State of New York? Could he be legitimate in one State and illegitimate in another? Such a rule would render the right of inheritance, sanctioned by the law of the State where he resided, one of great uncertainty and fluctuation, and in many cases it would operate so as to produce great injustice. While the power of the legislature is paramount unless restricted by constitutional authority, it should not be upheld where its effect may be to produce great wrongs, unless imperatively demanded. Any other rule would leave the plaintiff, whose status was fixed by the laws of Pennsylvania, subject to the change of statutes in any State where he might have occasion to reside, whose laws differed from the former State. Assuming that the plaintiff by the laws of the State of Pennsylvania was legitimate, the question arises whether that legitimacy was carried with him when his father and family removed to the State of New York. If the plaintiff labored under any disability in the State of New York it arose by reason of the provisions of law contained in the statutes of that State already cited. (1 R. S. 754, § 19.)

The law-making power can declare a child born to be legitimate or illegitimate, and it is only that power which fixes and determines the status of children born. If born before marriage the legislature can remove the disability of its illegitimacy, and by its transcendent power can legitimize and make capable of inheriting the illegitimate child. (Blackstone, 4 Inst. 36.) If this had been done by an act of the legislature of the State of New York, no question could arise as to the legitimacy of the plaintiff or his right to inherit. The statutes of this State, to which we have referred, do not contain the words "born out of wedlock," or the word "bastard." The English statute of Merton, so-called (20 Hen. 3, chap. 9), not only required that a child, in order to inherit, should be legitimate, but also that "he should be born in lawful wedlock as well." This consti-

tutes a marked difference between that statute and the statute of this State cited *supra*. Legitimacy, which was conferred upon the plaintiff by the laws of Pennsylvania, to which reference has been had, constituted a portion of his rights and accompanied him wherever he might reside. Being legitimate in the State of Pennsylvania, he continued so in every State and in every country where he chose to establish his residence. The rule seems to be well settled that the law of the domicile of origin governs the state and condition of a person in whatever country he may remove to. The status of legitimacy which arises under the law of one nation is recognized by other nations according to the authorities. Story lays down the rule in his Conflict of Laws (§ 93), that "foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin." He also says at section 93b: "It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of their offspring, as to legitimacy or illegitimacy, ought to depend on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property." Wheaton, in his Law of Nations, at page 172, says: "Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the State affecting all these personal qualities of its subjects travel with them wherever they go and attach to them in whatever country they may be resident." The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the State or country where the marriage takes place and the parents are domiciled, such legitimacy follows the child wherever it may go. This rule is, as we have seen, fully sustained by the authorities to which we have referred. The learned Judge Story, in his "Conflict of Laws," devotes nearly the entire fourth chapter, and no inconsiderable portion

of the work, to the consideration of the question involved in the case at bar, and he asserts the rule, that if a person is legitimated in a country where domiciled, he is legitimate everywhere and entitled to all the rights flowing from that status, including the right to inherit. He arrives at this conclusion after an examination and exhaustive discussion of the subject and after a comparison of the views of different writers upon civil law, quoting extensively from the same.

In support of the same general doctrine which has been discussed are the following authorities: *Smith v. Kelly's Heirs*, 23 Miss. 170; *Scott v. Key*, 11 La. Ann. 232; *Ross v. Ross*, 129 Mass. 243; *In re Goodman's Trust*, Law Reports, 17 Chancery Div. 266; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505.

The decision of this court might well rest upon the principle asserted in the authorities already cited without regard to the cases which are claimed to hold a contrary rule. It is enough to say that the right of inheritance under circumstances like these here presented rests upon a principle which is founded upon a rule of ancient origin, reasonable in itself and in accordance with the well being of society and a due regard to the right of persons, and that it is fully sustained by the weight of authority. The celebrated case of *Birtwhistle v. Vardill*, reported in 11 Eng. C. L. 266, also in 2 Clark & Fin. 581, and 7 id. 895, and 9 Bligh, 7, involved a question of similar character to that presented in the case at bar, and is specially relied upon by the respondent's counsel. It was there held that a child born in Scotland, of unmarried parents domiciled in that country, and who afterward intermarried there, is not by such marriage rendered capable of inheriting lands in England. By the Scottish law the marriage legitimated the child. It was laid down by the chief baron on behalf of the court that the comity existing between nations is conclusive to give the claimant the character of the eldest legitimate son of his father and to give him all the rights which are necessarily consequent upon that character. Thus sustaining the general doctrine that

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by the comity between different nations the laws of one should be recognized by the other in reference to rendering children of parents born out of wedlock legitimate, but it further held that the son could not inherit in England, for the reason that although he was legitimate he was not born in wedlock. The distinction between being legitimate and being born in wedlock would seem to be a narrow one, and it is difficult to see how it can be urged that a person can be made legitimate although born a bastard, and yet for the purpose of inheriting real estate be illegitimate because not born in wedlock. The particular phraseology of the statute of Merton, so called, had much to do with this limited and narrow construction, and it is but fair to assume that if the term "born in wedlock" had been excluded the right of inheritance would have been maintained. It was said in that case by BAYLEY, J., that "the right to inherit land depends upon the quality of the land and not upon any personal statutes." It would thus seem that the case was decided upon the peculiar laws governing real estate in England and especially upon the statute of Merton. It was twice argued in the House of Lords (2 Clark & Fin. 581; 7 id. 895), and eventually decided upon the sole ground that although a child born in Scotland before the marriage of his parents would become legitimate by the subsequent marriage of said parents, yet he could not inherit in England, for the reason that the English statute does not only require that the child be legitimate, but that he must also be born in wedlock. This distinction was strongly criticised by Lord BROUGHAM, one of the ablest of English jurists, and one of the judges in that case when last heard. He says: "If what is laid down in this case be law the bounds of that law are very narrow; if it is the law anywhere it prevails assuredly *only* as the law within the bounds of Westminster Hall. I know, wherever I go in Europe it is boldly denied to be the law. I know the opinion of Dr. Story and other American jurists is against us, and I do not think I could overstate the degree in which all these jurists dissent from the judgment in this case." (See 7 Clark & Fin. 915.) Wharton in his Conflict of Laws (§ 241), says in regard

to this case, "the opinion was based on the special ground that the English law as to the descent of honors and real property was of a positive and distinctive character, and could not be invaded by the prescription of a foreign jurisprudence." Parsons in his work on Contracts in commenting on this case says: "We think such a marriage in Scotland, supposing parents and child afterward come to America and be naturalized here, would be held here to make the child an heir as well as give him all other rights of legitimacy."

The case of *Smith v. Derr's Adm'rs* (34 Penn. St. 126) arose under a statute of Pennsylvania similar to the statute of Merton, and was disposed of in a very brief opinion upon the authority of the case of *Birtwhistle v. Vardill* (*supra*).

The case of *Lingen v. Lingen* (45 Ala. 410) is contrary to the general current of authority, and should not, we think, be followed.

When the State of Pennsylvania, by its legislature, declared that: "In any and every case when the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimate and enjoy all the rights and privileges as if they had been born during the wedlock of their parents," it did not mean that persons who were born illegitimate would only be legitimate if born in lawful wedlock. Its intention was to legitimize the offspring of those who were unmarried at the time of the birth of their child, and any other construction would lead to the making of provision for children lawfully born instead of those who were illegitimate. To hold a different rule would nullify the law and be contrary to the interpretation usually given to remedial statutes of the character of the one considered.

We do not deem it necessary to consider the question as to the definition of the word "legitimate;" whether it embraces "born out of wedlock" is in our opinion not material, as under the authorities we have cited, a child thus born may be made legitimate by law, and its legitimacy recognized in other countries besides the domicile of its parents, by the comity of

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nations. We think we have fully established this proposition, and, although there are some authorities which hold differently, they are not sufficient to overturn the doctrine laid down in the elementary books and reported cases.

The case of *Birtwhistle v. Vardill* is so limited and restricted that it must be held only to apply to the law as established in Great Britain. We have examined the other authorities not specially referred to, which have been cited by the respondents' counsel, and we think none of them are in conflict with the rule we have laid down.

In our opinion the judgment of the General Term was erroneous, and should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

JULIA B. FELLOWS, as Executrix, etc., Respondent, v. FRANCES LONGYOR, Impleaded, etc., Appellant.

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Where the guardian of an infant loans moneys belonging to his ward, receiving securities for the amount loaned, with lawful interest; but as an inducement to make the loan, receives a sum of money, as a bonus, for his own benefit, from the borrower, who pays the same with knowledge as to the title to the moneys loaned, this does not make the transaction an usurious loan. The guardian is not a lender of the trust fund, within the meaning attached to that term by our statutes, relating to usury.

The circumstance that the guardian has given a bond for the faithful performance of his duties does not affect the character of the transaction or of the securities so taken.

(Argued January 24, 1883; decided February 9, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 22, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Statement of case.

The nature of the action and the material facts are stated in the opinion.

F. Brundage for appellant. If this contract for loaning was made by the guardian as such, and the security taken to him in his official relation, the bond and mortgage is nevertheless usurious, the guardian, by virtue of his office, being the only person who can contract. (*Stout v. Rider*, 12 Hun, 574; *Van Wyck v. Walton*, 16 id. 209.) The legal title to the personal estate is vested in the guardian, while the equitable title remains in the infants. Being vested with the legal title, he had full power to dispose of the funds of his wards as he might choose. (*Manson v. Pelton*, 13 Pick. 206, 212; 1 Parsons on Contracts, 121, 133.) The plaintiff, having derived his title from the person who made the usurious contract, has no claim to be the champion or protector of the infants, and acquires no rights by assuming that character. (*Burdick v. Jackson*, 7 Hun, 488, 491.)

Geo. W. Cothran for respondent. A party alleging the defense of usury, so highly penal in its character, must allege the usurious agreement specifically in all its parts, and is bound to prove the defense as alleged. (Tyler on Usury, 458-464; *Vroom v. Ditmas*, 4 Paige, 526; *N. O. G. L. Co. v. Dudley*, 8 id. 452, 456-457; *Rowe v. Phillips*, 2 Sandf. Ch. 14; *Manning v. Tyler*, 21 N. Y. 567; *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Horner*, 12 id. 601; *Clarke v. Hastings*, 9 Gray, 64.) It does not render a transaction usurious for the agent making the loan to exact a bonus for his own use, so long as it is unknown to the lender, and the lender is not to be benefited thereby. (*Estevez v. Purdy*, 66 N. Y. 446; *Condit v. Baldwin*, 21 id. 219; *Lee v. Chadsey*, 3 Abb. Ct. of App. Dec. 43; *Guardian Mut. L. Ins. Co. v. Kashaw*, 66 N. Y. 544.) Where the agent takes a security in his own name, but which really secures a debt due to his principal, the principal may sue upon the security and allege that it was made to him. (Code of Procedure, §§ 111, 113; Code of Civil Procedure, § 449.)

Opinion of the Court, per RUGER, Ch. J.

RUGER, Ch. J. This action is brought to foreclose a mortgage of \$5,000, given March 29, 1870, by appellant, Frances Longyor, to one Abner P. Downer, guardian, etc., upon lands in Niagara county. The mortgage was assigned by Abner P. Downer, guardian, etc., to the plaintiff, on the 12th day of June, 1876, which assignment contained a covenant on the part of the said Downer that the sum of \$5,322 was unpaid thereon, that there were no defenses or offsets to said mortgage, with a guaranty of its collection.

The whole sum secured to be paid becoming due in May, 1878, this action was commenced to foreclose. The mortgagor, Frances Longyor, answered, pleading the defense of usury, alleging that the mortgage was given by the defendant to Abner P. Downer to secure a loan of \$5,000, and that it was, at the time of such loan, corruptly and against the form of the statute, agreed between the defendant and Downer that she should pay him the sum of \$300 for the loan and forbearance of said money; that the loan was afterward made and the \$300 paid to Downer by defendant.

Upon the trial the proof established and the court found the following facts among others: that Abner P. Downer was, at the time of this transaction, the duly appointed guardian of his infant brother and sister, William V. Downer and Alice M. Downer; that he had accepted the office and executed bonds for the faithful performance of his duties, and that from the funds belonging to his wards the loan in question was made; that in February, 1870, one John H. H. Clark, the son of the defendant Frances Longyor, was the owner of a bond and mortgage given to him by his mother, to secure the sum of \$2,270 with interest; that the defendant, being desirous of borrowing a sum of money, authorized Clark to obtain it; Clark applied to Downer for a loan which resulted in an agreement "that Downer should purchase of Clark his bond and mortgage of \$2,270 and loan Frances Longyor the additional sum of \$5,000, and that Downer, for the purchase of the bond and mortgage, and for making the loan, should be allowed a discount from the amount due on the Clark bond and

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mortgage, of the sum of \$471.48. This transaction was consummated by the assignment by Clark to Downer of his mortgage, and the payment to him by Downer of the amount secured by this mortgage, less the sum of \$471.48.

Afterward, and on the 29th of March, 1870, the defendant, Frances Longyor, executed to Abner P. Downer, guardian, etc., to secure the loan to her, the bond and mortgage in suit, and upon its delivery to Downer, received from him, through her agent Clark, the full sum of \$5,000.

The court further found that the sum of \$471.48, agreed to be deducted from the face of the Clark bond and mortgage, was fixed upon and deducted as a sum to reward Abner P. Downer, personally, for making such purchase and loan, and was so understood by both parties, and it was not intended by Downer that it should be paid over to the persons for whom he was guardian; that Clark and Longyor both knew at the time of the making of this purchase and loan that the moneys used for that purpose belonged to the funds in Downer's hands as guardian of his brother and sister, and that it was the purpose and intention not only of Downer, but also of Mrs. Longyor and her agent Clark, to have the bond and mortgage in question made payable to Abner Downer as such guardian. The court also found that at the time of the trial the general guardian had settled with and paid his wards, but when did not appear; and finally that this transaction was not usurious, and that the securities were valid in the hands of the plaintiff. The above are substantially all of the findings material to the questions raised on this appeal.

There is no evidence or finding as to the actual value of the Clark mortgage at the time of this transaction. Neither is there any finding as to what specific sum, if any, was to be allowed to Downer for the loan of the \$5,000. The court refused to find that the sum of \$300 was to be allowed for such purpose. We are now asked to reverse the judgment rendered upon this report, and to declare the transactions in question usurious as matter of law.

Decisions are quite numerous to the effect that the purchase

of interest-bearing notes or mortgages at less than their face value, though their payment be guaranteed by the vendor, are not necessarily usurious. (*Brooks v. Avery*, 4 N. Y. 225; *Cram v. Hendricks*, 7 Wend. 569; *Thomas v. Fish*, 9 Paige, 478; *Catlin v. Gunter*, 11 N. Y. 368; *Cobb v. Titus*, 10 id. 198.) There is no presumption that a mortgage is of the value of the sum appearing as unpaid thereon, especially when it is transferred in connection with a loan which is claimed to be usurious on account of the difference between the price paid and the amount purporting to be unpaid thereon.

SAVAGE, Ch. J., says: "Usury is a defense which must be strictly proved, and the court will not presume a state of facts to sustain this defense where the instrument is consistent with correct dealing." (*Marvin v. Feeter*, 8 Wend. 533. See, also, *Smith v. Marvin*, 27 N. Y. 142; *Mutual Life Ins. Co. v. Kashaw*, 66 id. 544; *Thomas v. Murray*, 32 id. 610.)

From the findings in this case, and the absence of any proof of value, we might well presume that the price paid by Downer for this mortgage represented its actual value. To hold otherwise would require us to decide as matter of law in order to support a defense of usury, that this mortgage was of greater value than the price paid, although the findings of the court below are not inconsistent with the fact that the mortgage may have actually been worth much less. But it is unnecessary, and perhaps under the peculiar condition of the findings in this case, improper to dispose of the case upon this ground, as we think the judgment sustainable upon another theory. The funds with which this loan was made did not in equity belong to Abner P. Downer, but were the property of an estate of which he was the representative. He could not use those funds for his own purposes, and had the right to invest them only in obedience with settled rules of law relating to the investment of trust funds. These rules forbid their employment in illegal or speculative transactions as well as in the purchase of doubtful and indiscriminate securities.

It was said by Judge WOODRUFF, in the case of *King v. Talbot* (40 N. Y. 84): "It is not true that there is no under-

lying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not; whether it has been enacted in statutes or not; whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and *cestui que trust* a duty to be faithful, to be diligent, to be prudent in an administration intrusted to the former, in confidence in his fidelity, diligence and prudence."

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, every thing that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment made."

The guardian, Abner P. Downer, stood in the relation of an agent to this property; not only that, but an agent bound in law to execute his power over the funds in a special, limited and lawful manner, and who could be relieved from this duty only by the order of a court having jurisdiction of the matter. The defendant knew the limit and extent of the trustee's authority, for that was defined by rules of law, of which she, like all others, must be presumed to have had knowledge. Knowing this, she approached the guardian to procure moneys belonging to this estate, and sought to accomplish her purpose by offering a personal inducement to the custodian of these funds. It is impossible to hold that this transaction was usurious. A trustee, although he may be vested with title to the trust fund, has a mere naked title, without any proprietary or disposable interest in the property. His power over it is limited either by known rules of law or those capable of easy ascertainment, and he cannot be considered the lender of the trust funds within the meaning attached to that term by our statutes relating to usury. By the contract of loan, the real lenders were not to receive any thing in excess of legal interest.

The principles frequently declared by this court seem to preclude any view of this transaction which would lead to a contrary conclusion. The cases are quite numerous to the effect that where an agent loans moneys belonging to his principal,

and as a condition of the loan receives a bonus from the borrower for his own benefit, without the knowledge, consent, or authority of his principal, the security taken for such loan is not thereby rendered void for usury. (*Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 id. 168; *Estevez v. Purdy*, 66 id. 446; *Mutual Life Ins. Co. v. Kashaw*, *supra*.) In analogy with this principle, we think the transaction in question was not usurious. The borrower here was informed that the funds proposed to be used were not the individual funds of Abner P. Downer. She treated with Downer as the representative of principals who were the real owners of the fund from which the loan was made. Not only this, but she also knew that these were trust funds, subject in their disposition and control to the rules governing the investment of trust estates, and from the very nature of the case that their custodian was forbidden by law from engaging in illegal transactions with such funds. She entered into this contract, therefore, knowing that Downer did not, and could not, have authority to enter into a usurious contract on behalf of his principals; not only this, but she did not pay, or agree to pay, the actual owners of the funds a bonus, but agreed to pay it to Abner P. Downer for his individual use. By the terms of the agreement the real lenders in this case were not to receive, either directly or indirectly, any thing beyond legal interest and the repayment of the money actually loaned. If an adult can be relieved from an apparently usurious contract made by his agent, upon the ground that the usurious premium was taken and retained by such agent without the principal's knowledge, authority or consent, how much stronger is the position of an infant, the disposition of whose property is environed by stringent legal rules, and who is always subject to the disabilities of nonage, rendering him incapable of binding himself, either by acquiescence or consent.

It is quite unnecessary to discuss the effect of a subsequent ratification by the principal, upon the loan, and the subsequent relations of the agent to the principal, for this case is destitute of evidence of ratification. It is enough to say that it would have no different effect than that of a subsequent ratification

in the cases of *Condit v. Baldwin*, and others above cited. The acceptance of the security, and bringing suit thereon by the principal with knowledge of the act of the agent, is not a ratification. (*Estevez v. Purdy*, *supra*; *Stout v. Rider*, 12 Hun, 574.) Especially would this be so, if knowledge of the transactions attending the loan is not brought home to him.

The position urged by the counsel for the appellant that this loan must be regarded as an individual transaction between Abner P. Downer and the defendant, although he was described in the bond and mortgage as Abner P. Downer, guardian, etc., cannot be maintained. It is thought to be supported by a line of cases holding that an addition to the name of a contracting party, of his title or office, does not deprive the contract of its personal character. These authorities have no application to this case. They relate only to the liability of the person employing such title in an action between him and a third party. (*Sutherland v. Carr*, 85 N. Y. 110.) The question here is that of the ownership of the moneys represented by this mortgage, and is to be determined by the principles governing the ownership and management of trust estates. The words "guardian, etc.," inserted in the securities in question, operated as notice to the defendant Longyor, of the rights of the wards of whom Downer was guardian. (*Pendleton v. Fay*, 2 Paige, 202; *Budd v. Munroe*, 18 Hun, 316; *Duncan v. Jaudon*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 389; 1 Am. Rep. 115.)

It is repugnant to the equitable principles controlling the management and disposition of trust estates to say that a trustee can acquire an interest in trust property as against his *cestuis que trust*, merely by dealing with it in his individual name. (2 Perry on Trusts, § 836.) The circumstance that a trustee has given a bond for the faithful performance of his duties does not affect the application of these principles. Such security is usually given upon the appointment of a trustee by a court, and in the case of many other trusts, and yet it has never been supposed that this fact in any way impaired the remedies open to the beneficiaries of a trust, or had any

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other effect than to give them the additional security furnished by the bond. The *cestuis que trust* have the option to prosecute the trustee and his bond, or to follow and reclaim the property. (2 Perry on Trusts, § 843.)

In conclusion we say that, while there may be trusts of such a character that an illegal and usurious loan of the funds belonging to them will render the securities taken therefor void, in the case at bar we are satisfied that it would be inconsistent with well-established principles to hold that the loaning of the moneys of an infant by his legal guardian is usurious, although the guardian exacted more than lawful interest for the loan.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

ELIZABETH SHEEHAN, as Administratrix, etc., Appellant, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Respondent.

S., plaintiff's intestate, was fireman upon an engine drawing a train, "No. 337," going west, on a branch of defendant's road, the business of which was prosecuted over a single track. The train was known as a "wild cat" train; i. e., one running irregularly, without reference to schedule or the regular trains, and moving by special orders. A regular train, "No. 50," was due at Cayuga, going east, according to schedule, at 4:40 P. M., and would leave at 4:45. Train "337" was then at Auburn, and at 4:46 the superintendent of the road telegraphed from Rochester to its conductor and engineer: "Wild cat to Cayuga regardless of No. 50; 12," the numerals at the end meaning "answer how understood." The rule of defendant in regard to the movement of trains by telegraph required the order to be first copied by the operator at Auburn in an order book and repeated back to the dispatcher, and after receiving back a message "O. K.," said operator was required to copy on a blank for the conductor and engineer, who, after comparing it with the book and seeing it was correct, were required to sign their names in the book prefixed by "18," meaning: "We understand," which numeral with the signatures the operator was required to transmit to the dispatcher, who, thereupon, was to repeat the

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order. All of this was done, and train "837," according to such order, left Auburn. No communication was sent by the superintendent to the conductor or engineer of train "50" in regard to the movements of train "837," but at 4:10 he telegraphed to K., the operator at Cayuga, to hold "No. 50" for orders, which he received and repeated back. K. said to the conductor of "50:" "Hold No. 50 for 61," without exhibiting or delivering any message, and no rule or order of defendant required him to do so. There was a rule that "whenever any agent or operator receives an order to hold any train * * he must carry out the order strictly." "61" was a train going west ahead of "837;" it came in soon after, whereupon "50" started out, and collided with "837," and S. was injured. In an action to recover damages the court submitted to the jury the question whether "the defendant had omitted the doing of any thing which it ought reasonably to have done to prevent the casualty." *Held* no error; that having ordered "837" to travel on the time of "50," defendant was bound to exercise every reasonable precaution that the latter should not leave Cayuga before the arrival of the former; and that its failure to communicate direct with the conductor and engineer of "50" presented a question for the jury.

Slater v. Jewett (85 N. Y. 61; 39 Am. Rep. 627), distinguished.

(Argued January 26, 1883; decided February 9, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made October 28, 1881, which set aside a verdict in favor of plaintiff and ordered a new trial.

This action was originally brought by Dennis Sheehan, the present plaintiff's intestate, to recover damages for injuries received by him in a collision of two trains on the Auburn branch of defendant's road. During the pendency of the appeal to this court Sheehan died and the present plaintiff was substituted.

The material facts are stated in the opinion.

William S. Oliver for appellant. It is not indispensable that the particular circumstances relied upon to prove a fact should be contradicted in order to dispute the fact itself. If other facts appear in the case in antagonism with the alleged fact, it is the province of the jury to determine whether the fact is proved. (*Hazman v. Land Co.*, 50 N. Y. 53; *Bevier*

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v. *D. & H. C. Co.*, 13 Hun, 257.) The facts proved entitled plaintiff to recover. (*McLallen v. R. R. Co.*, 84 Ill. 109; *R. R. Co. v. Henderson*, 37 Ohio St., 549; 67 Penn. St. 314; *Greenleaf v. R. R. Co.*, 29 Iowa, 47; *Keegan v. Kavanaugh*, 62 Mo. 230; 74 Penn. St. 223; 61 id. 58; *Patterson v. R. R. Co.*, 76 id. 389; *Clarke v. Holmes*, 7 Hurlst. & Norm. 937; *Snow v. R. R. Co.*, 8 Allen, 441; 44 Md. 283; *Newson v. R. R. Co.*, 29 N. Y. 390; *Flike v. R. R. Co.*, 53 id. 556; *Fuller v. Jewett*, 80 id. 46; *Slater v. Jewett*, 85 id. 61; *Hough v. R. R. Co.*, 10 Otto, 213-217; *Ford v. R. R. Co.*, 110 Mass. 241; *Bradley v. R. R. Co.*, 62 N. Y. 99-104; *Booth v. R. R. Co.*, 73 id. 38-41.)

W. H. Adams for respondent. Plaintiff cannot recover, for the reason that this accident is one of the risks and dangers incident to the employment of her intestate, and one which he assumed in entering upon or remaining in such employment. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Warner v. Erie Railway Co.*, 39 id. 468; *Haskins v. N. Y. C. & H. R. R. Co.*, 65 Barb. 129; affirmed, 56 N. Y. 608; *De Forrest v. Jewett*, 88 id. 264.)

DANFORTH, J. As between servant and employer, the latter is bound to use reasonable care in the prosecution of the business in which he engages the former, and it cannot be made out upon principle, or from any case of authority, that he shall not be liable for damages arising from a failure to do so. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Cons v. Del. Lack. & West. R. R. Co.*, 81 N. Y. 206; 37 Am. Rep. 491; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Booth v. The Same*, 73 N. Y. 38; 29 Am. Rep. 97.) So, where the master delegates to another entire control over a particular branch or circumstance of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servant, and his acts or omissions relative thereto are the acts or omissions of the master

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himself. (*Like v. Boston & Albany R. R. Co., supra.*) These rules apply here. The relation of master and servant existed between the defendant and Dennis Sheehan, and the jury have found that his injuries were caused by the omission of the defendant to provide against the event which occasioned them; but their verdict has been set aside in deference, it is said, to a decision lately made by this court in *Slater v. Jewett* (85 N. Y. 61; 39 Am. Rep. 627). We think that case has been misapplied. There the defendant changed the time of the running of its train, but only after setting in motion a series of operations designed to carry personal notice to its employee of the intended change and bring to the master an acknowledgment in writing that he had received notice of it. The rule which required these precautions, provided for all supposable contingencies, but they failed by reason of the omission of duty of a fellow-servant. Not so here. The rules of the defendant imply the necessity of care similar to that taken in the case cited, but they do not extend to such an emergency as put the plaintiff in danger, and were inadequate for his protection. The business of the defendant was prosecuted over a single track railway by means of regular trains moving at times prearranged and noted on cards or time tables, and also by occasional trains moving without prearrangement, but by special order without reference to any schedule or the regular trains, and, conforming to no conditions save the immediate order of the owner, were styled "wild" or "wild cat." Train "50" was of the first, and train "337" of the latter kind. The plaintiff Dennis Sheehan, was fireman on its engine. The terminal stations, so far as any question here is concerned, were Auburn at the east, and Cayuga at the west. Train "50" was due at Cayuga from the west, according to the schedule, on the 22d of August at 4:40 P. M., and would go east at 4:45. Train "337" was at Auburn, and at 4:46 the superintendent of the road telegraphed from Rochester to the conductor and engineer of the train, "wild cat to Cayuga regardless of No. 50. 12, G. H. B." It was shown that the numeral "12," at the end of the order, means "answer

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how understood," and "G. H. B." were the initials of the superintendent of the road. The rule of the defendant then in force, relating to the "movement of trains by telegraph," required this order to be first copied by the operator at Auburn in an order book provided for that purpose, and repeated back to the dispatcher, "to be sure" (as the rule says) "it is correct." After receiving from the dispatcher a message "O. K.," the operator was required to make a copy on a blank for the conductor or engineer, the persons addressed, "who will" (the rule requires), "after comparing it with the book and seeing it is correct, sign their names to the book prefixed by the numeral '13.'" Thereupon the operator must transmit the "13," accompanied by the signatures of the persons addressed, to the dispatcher. The numeral "13" signifies "we understand," and is followed by a repetition of the order. In this instance the conductor and engineer of "337" answered "we understand: wild cat to Cayuga regardless of No. 50." Here there was full and perfect communication between the parties; nothing was left to the discretion of either the operator or the train-men, nor was either permitted to exercise an independent judgment as to the meaning of the order or its delivery. Every thing was precise and notice brought home to the persons to be affected. But it is obvious from what has already been stated, that this order entailed upon train "337" and its hands, certain destruction from "No. 50," unless the movement of the latter train was stayed. We should expect, therefore, in view of the practice so minutely applied to "337," that similar preventive measures would have been applied to "No. 50," and as its time had been given to "337," and its right of way appropriated, that its conductor and engineer would have been informed of those facts; but nothing of the kind was done. No communication was sent to those persons, no rule of defendant required it, and they were in fact left in absolute ignorance that train "337" was to move on their time, or that it was to move at all. But the defendant had a telegraph operator at Cayuga by name Kieffer, and at 4:10 the superintendent telegraphed from Rochester as follows: "To W. F.

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Kieffer, Cayuga. Hold No. 50 for orders. 12, G. H. B." Kieffer acknowledged the message, saying, "I understand to hold No. 50 for orders." Train "5" then came in going west, and afterward "No. 50" at 4:35 or 4:40. As "No. 5" was about leaving, Kieffer met the conductor of train "50" between train "5" and train "50," and said to him "hold No. 50 for 61." He neither exhibited nor delivered any message; he said nothing else. No rule or order of the defendant required him to do either. "61" came in soon after, and "50" started out toward Auburn. In a few moments it collided with "337," and hence the plaintiff's injuries. Kieffer was employed to receive and deliver messages and send them when required. No order was given him to deliver the message he received on this occasion, and he was not informed in regard to train "337." He says he "was stationed there to communicate orders of the road from the dispatcher — was his messenger." Examined by the defendant and asked, "what were your general instructions?" says, where messages were directed to the conductor and engineer "I deliver them," where directed to me, it was my "duty to tell them what it read."

It was not disputed at the trial, nor is it upon this appeal, that the dispatching of train "337" — wild cat — and the holding of train "50", were within the province of the superintendent, nor that, in respect thereto, he represented the defendant in its corporate capacity. Clearly he held that relation; but another rule of the defendant, printed under the same general heading as the other, was put in evidence, and is called by the respondent to our attention, viz.: "When an agent, or operator receives an order to hold any train, for any purpose, he must carry out the order strictly. Conductors and engine-men will respect and comply with the same in all cases." These facts appeared upon the trial, and the learned trial judge, although moved thereto by the defendant, refused to nonsuit, and gave the case to the jury as one in which they might inquire, "whether the defendant had omitted the doing of any thing which it ought reasonably to have done, to

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prevent the casualty which resulted in the plaintiff's injury." In this there was no error. Having ordered "337" to travel on the time of "50," the defendant was bound to exercise every reasonable precaution that train "50" should not leave Cayuga before the arrival of "337." No reason is given for not communicating with the conductor and engineer of train "50" before it reached Cayuga, or at least on its arrival there. The defendant annulled its time table — made it imperative upon "337" to move in spite of the prearranged right of "50," and not only omitted as to "50," the exceedingly proper and wise conditions on which alone "337" was permitted to obey, but failed to send any communication, whatever, to "No. 50." Its omission to do so not only defeated all previous precautions, but converted them into means of destruction. The object should have been to prevent train "50" from running according to the time table. To secure certainty in that respect, the defendant should have so communicated with its conductor and engineer that these servants would understand the object. It is plain that the mode of communicating, already adopted with "337," was ample and effectual. Two parties only were involved, the master and its servants upon the train, and the only hazard was disobedience or forgetfulness on the part of those servants. In the method adopted another event was introduced, upon which the first was made dependent. Instead of communicating with the engineer and conductor, the defendant communicated with a third person — the telegraph operator, and told him to "hold the train for orders." The train was made subject to his will, and the object in view became dependent upon his memory, and his faithfulness in obeying the order, and the probabilities of its attainment were thereby lessened.

It cannot be said, therefore, as matter of law, that the defendant so dealt with the problem before it, as not to expose the plaintiff — its servant, to perils against which he might have been guarded by proper diligence, on its part, and, as matter of fact, the jury might well find that it did not take such reasonable care to protect him from accident, as the exigencies

of the situation required. Indeed, the evidence shows that he was needlessly put in a place where injury was made inevitable, by the direct interference of the defendant.

It is one thing for the orders of the master to go by report, or hearsay to the servant, and quite another when they are received by him directly, and without an intervener. In the first they are liable to be conceived wrong, and repeated untruly, as was the case in this instance, while in the last such mistake is at least improbable. The law does not exact absolute certainty, but when life is at stake, it demands that care shall be taken to provide so far as possible against all contingencies, and whether the importance of a right understanding of the order, actually given, as to train "50," required that one mode of communication, rather than another, should be adopted, was for the jury to say. Among other facts they could consider that the effect of starting train "50" on its prescribed time was as well known to the defendant when it directed "337" to move, as it was after the collision. That event came from no cause of the existence of which it was ignorant, but from one which it might have controlled. The defendant had created the exigency, and was bound, in some practicable way to adjust the running time of train "50" to it, and for the consequences of the omission of any reasonable act, tending thereto, it was liable. It was not enough to tell Kieffer to hold the train. The duty of holding it devolved upon the defendant, and its breach was not excused by showing that it would have been held if Kieffer had performed his duty.

It is argued, however, by the respondent's counsel that the plaintiff took the risk of defects in the defendant's system of running trains by telegraphic orders. There are cases where such an argument might apply, but I am not aware of any principle which releases the master from liability to an employee who has been injured by the very act of his employer, or by the omission, on its part, to provide rules which, faithfully carried out, would ensure safety. There was no such bargain between the parties, and public policy forbids

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that one should be implied. Moreover the question raised by the defendant, was, at the request of his counsel, submitted to the jury, and they found that the plaintiff neither knew, nor had the opportunity of knowing, the methods employed by the defendant in running its trains by telegraphic orders, but, however the fact might be, the peremptory order of the superintendent to go forward, regardless of "No. 50," was an assurance that the track would be free and safe for the journey, and required the defendant to take reasonable precautions to make it so. The rules of the defendant did not require Kieffer to submit the message, received by him, to the conductor or engineer of train "50," nor a communication back from those persons, that they had received, and understood the order; an omission of either circumstance was the act of the defendant, and in the absence of other precautions, might properly be held to constitute negligence. The jury have found, upon sufficient evidence, that such precautions were not taken.

It follows that the case was well disposed of at the trial, and the plaintiff should have judgment on the verdict. Therefore, the order of the General Term is reversed, and judgment ordered upon the verdict, with costs.

All concur.

Ordered accordingly.

NAOMI S. HARRIS, Individually and as Executrix, etc., Respondent, v. HORACE HISCOCK, Appellant.

Plaintiff and L. M. H., her testatrix, executed a lease under seal of their interests to defendant, who went into possession under it. Subsequently, differences having arisen, the parties entered into an agreement under seal to submit the matters in difference to arbitrators, which contained a provision that "the lease shall be surrendered," the arbitrators to determine how much damage or compensation, if any, shall be paid by the lessors to the lessee "for such surrender." The lease was delivered to the arbitrators, who made an award which was set aside as void. Thereafter, L. M. H. and one of the arbitrators died. In an action to recover rent reserved by the lease, *held* that the agreement to arbitrate, at the

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moment of its execution, operated as a surrender and cancellation of the lease; that neither the failure to make a valid award, nor the revocation of the submission by death of one of the arbitrators or of one of the parties operated to revive the lease; and that therefore the action was not maintainable.

(Argued January 26, 1883; decided February 9, 1883.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 10, 1882, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiff individually and as executrix of the will of Lucy M. Harris, deceased, to recover rents alleged to be due under a lease of the interests of plaintiff and decedent in certain real estate to the defendant, which real estate was owned by the parties as tenants in common. The lease was executed under seal March 1, 1873, and defendant took possession under it. Certain matters of difference in regard to the real estate and other things having arisen between the parties by an instrument in writing under seal, executed in September, 1873, the parties agreed to submit said matters to arbitrators named, for their decision and award, in which submission it was provided as follows, among other things: "The lease executed by Lucy M. Harris and Naomi S. Harris to Horace Hiscock, dated March 1, 1873, shall be surrendered by said Horace Hiscock to said Lucy M. and Naomi S. Harris, and said arbitrators * * * shall determine how much damage or compensation, if any, shall in justice and equity be paid by said Lucy M. Harris and Naomi S. Harris to said Horace Hiscock by reason of and for such surrender." Pursuant to said submission said arbitrators made their award in writing, which was subsequently held void by this court (74 N. Y. 108). The judgment entered upon the remittitur in that action declared the submission also null and void. This was amended on appeal to this court (80 N. Y. 407). Said Lucy M. Harris and one of the arbitrators have since died. Further facts appear in the opinion.

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Hiscock, Gifford & Doheny for appellant. The portion of the award as to the lease should stand and be held valid, because distinct from and not dependent upon, and not exactly between the same parties as the other part thereof. (*Hiscock v. Harrises*, 74 N. Y. 108; *Nichols v. R. C. M. Ins. Co.*, 22 Wend. 125, 129; *Smith v. Sweeny*, 35 N. Y. 291, 295; *Cox v. Jagger*, 2 Cow. 638, 649; *Bacon v. Wilber*, 1 id. 117.) Awards are as much, if not more, favored than other instruments, in construing them so as to sustain them. (*Jackson v. Ambler*, 14 Johns. 96, 102; *Morse on Arbitrations*, 411; *Coke's Litt.* 42; *McConnell v. Sherwood*, 58 How. 453, 460; *Purdy v. Delevan*, 1 Cain, 303; *Case v. Ferris*, 2 Hill, 75; *Perry v. Mitchell*, 2 D. & L. 452; *Fredricor v. Guardian M. Ins. Co.*, 62 N. Y. 392.) The lease was terminated by the agreement to arbitrate. (*Keep v. Keep*, 17 Hun, 152, 154; *Baldwin v. Barrett*, 4 id. 119, 120; *Schofield v. McGregor*, 63 N. Y. 638; *De Peyster v. Pulver*, 3 Barb. 284; *Fullager v. Reville*, 3 Hun, 602; 12 Johns, 274; *Battel v. Rochester City B'k*, 3 Comst. 88, 91.) The absolute and comprehensive language of said agreement of submission, that "said lease shall be surrendered" and that the arbitrators shall determine how much compensation said Harrises shall pay said Hiscock for such surrender, merged said lease in said submission and terminated all said Harrises' right of action thereon. (*Kirkland v. Dinsmore*, 62 N. Y. 170; *Lang v. N. Y. C. R. R. Co.*, 50 id. 76; *Wilson v. Dan*, 74 id. 531; *Renard v. Sampson*, 12 id. 561; *Langworthy v. Smith*, 2 Wend. 587; *Erie Co. S'vgs. B'k v. Roof*, 48 N. Y. 292; *Hill v. Foster*, 9 Barb. 18; *Viele v. Judson*, 82 N. Y. 32; *Weyh v. Boylan*, 85 id. 394, 399.)

Oliver Porter for respondent. The adjudication that the award is invalid and of no effect, invalidates all subsequent proceedings depending solely upon it. (*Rust v. Hauselt*, 8 Abb. N. C. 148, 154; *Hiscock v. Harris*, 80 N. Y. 402-407.) The death of either party, or of the arbitrator, or one of them, will operate as a revocation of the submission. (17 Ves. Ch. 281; 2 Kent's Com. [9th ed.] 872, 645; *McIntyre v. Morris*,

14 Wend. 90-95.) The determination of the question whether the plaintiffs "in their own judgment required the money in their support," belonged absolutely to the plaintiffs, subject to no control. (*Lyster v. Ames*, 6 Lans. 280; *Spring v. Ansonia Clock Co.*, 24 Hun, 175.)

FINCH, J. When this case was first before us we awarded judgment absolute in favor of the defendant. (74 N. Y. 108.) The extent and effect of that judgment was disputed, and it came back to us for explanation. We then held that the award of the arbitrators was null and void, but left the submission undisturbed, and to stand for what it was worth. (80 N. Y. 407.) But while the submission was not affected by our judgment, it is now claimed to have been revoked by the death of one of the arbitrators and of one of the parties before an award lawfully made. Granting the proposition for present purposes, it still does not follow that this recovery can be sustained.

This action is upon the lease. It is founded on the covenant to pay rent. It is not based upon defendant's use and occupation. On the contrary, the value of such use and occupation under the existing circumstances was excluded, upon an objection that the lease fixed the amount of rent. The plaintiff's rights, therefore, must stand upon the lease as a valid and subsisting agreement, or are without foundation. What occurred appears to have been this. In March, 1873, a lease of the farm was made to the defendant for a term of twelve years and he went into possession under it. Very soon difficulties sprang up between lessors and lessee. The house was occupied by both parties, and the opportunities for quarrel were numerous. The lessors desired to cancel the lease and be rid of the defendant, and he proved not unwilling. As a result the arbitration agreement was made. That was in writing and under seal and bore date of September, 1873. It contained a provision in these words: "the lease executed by said Lucy M. Harris and Naomi S. Harris to Horace Hiscock, dated March 1, 1873, shall be surrendered by said Horace Hiscock to said Lucy M. and Naomi S. Harris, and said arbi-

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trators * * * shall determine how much damage or compensation, if any, shall in justice and equity be paid by said Lucy M. Harris and Naomi S. Harris to said Horace Hiscock by reason of and for such surrender." This agreement on its face and at the moment of its execution amounted to an abandonment of the lease by mutual consent. (*Graves v. White*, 87 N. Y. 465; *Dubois v. The Delaware & Hudson Canal Co.*, 4 Wend. 290.) The tenancy constituted by a contract in writing under seal was ended by an instrument also in writing and under seal. The agreement to surrender, made and accepted, was itself a surrender since its operation was not postponed, and was in substance a contract annulling the lease. The further provision as to compensation recognized that meaning, and no other construction seems to us possible. In accordance with this understanding both parties acted. The defendant delivered up the written lease to the arbitrators that they might know it was canceled since their award was to be founded on that fact. The evidence makes it probable that they destroyed it, but whether they did or not is immaterial. A destruction or cancellation of the paper was wholly unnecessary. It was canceled by the sealed agreement of surrender. Both parties consented to end it and put their consent in writing. It was mutually abandoned, and ceased to exist. The lessee was relieved from its covenants and the lessors gained an immediate right of possession. Nothing remained but an equitable claim for compensation for the surrender of the term. That surrender was not the submission. It was a step preliminary; a condition agreed on. Whether the lease should or should not be surrendered was not left to the arbitrators, or involved in the submission. The parties themselves took care of that. They canceled the lease by written agreement, and submitted to the arbitrators only the question of a just compensation for the act done. The latter have made no valid award. That does not revive the dead lease. Possibly the submission is revoked. That does not undo the thing done. The lease was canceled by mutual agreement under seal. The failure of the arbitration cannot restore the abandoned contract. No suit, therefore, can be maintained upon it for it

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does not exist. If Hiscock remained in possession he was not in under the lease. If he was liable for any thing it was not for the rent reserved. If he can sue for any thing it is not upon the covenants in the lease. It can only be for compensation for its surrender. At the date of the submission, it was not only the legal effect of the transaction that the lessors lost all right to the proportion of rent accrued, but such plainly was the intent of the parties; for their arbitration agreement implied, not that any thing was due the lessors, but that over and above the use which the lessee had of the land there was still some compensation due equitably for the surrender of the long term. And so the arbitrators understood it, for they sought to give him that compensation by allowing him without rent or charge the free use of the farm to the end of the first year. That award was void, but the revocation of the submission by death, and the failure of the award affected only the agreed remedies of the parties, and did not change their rights as they themselves had fixed them. What is called the submission was that, and something more. Outside of the agreement to arbitrate there was a contract to dissolve the lease. That did not depend upon the submission, or the life of the arbitrators. There remained to the lessors a right of possession, and to the lessee release from his covenants and a right to equitable compensation, although neither right could be enforced by the arbitration which had failed. In cases of contracts between vendor and vendee, rescinded and abandoned by mutual consent, the parties are restricted to the legal rights which each had before the contract was made. (*Battle v. Rochester City Bank*, 3 Comst. 88; *Tice v. Zinsser*, 76 N. Y. 549.) If the defendant is liable for his occupation after the surrender, it is not under the lease, or for the rent reserved, but for the fair value, if that shall exceed a just compensation for the surrender of his term.

The judgment should be reversed and new trial granted, with costs to abide the event.

All concur, except RUGER, Ch. J., and RAPALLO, J., taking no part.

Judgment reversed.

Statement of case.

ELISHA S. FOWLER et al., Appellants, v. LUCY HAYNES, as Administratrix, etc., Respondent.

Under the provisions of the Code of Procedure (Subd. 15, § 64), as amended in 1860, * authorizing the defendant in an action in a justice's court, to make an offer of judgment "on the return of process and before answering," and upon acceptance thereof by plaintiff authorizing the justice to render judgment accordingly, the words "on the return of process" do not limit the authority to the return day specified in the process, but it may be exercised immediately after service and actual return thereof.

Where, therefore, upon the same day of the issuing of a summons by a justice of the peace, but after its service and actual return by the constable with proper certificate of service, the parties appeared by attorneys who duly swore to their authority to so appear, and plaintiffs' attorney filed his complaint in writing, whereupon defendant's attorney made an offer in writing to allow judgment for the amount claimed in the complaint, which was accepted and judgment entered accordingly. *Held*, that the judgment was valid; also *held*, that authority to defendant's attorney to appear for her empowered him to make the offer of judgment, and that, therefore, it was not necessary, in addition to swearing to authority to appear generally, that he should have sworn to authority to make the offer.

In an action to recover the possession of personal property, defendant claimed under a judgment against plaintiffs' assignor, and execution thereon levied on the property, alleging that the transfer to plaintiffs was fraudulent and void as to creditors. The property was taken and delivered to plaintiffs. Defendant succeeded in his defense. The value of the property as found was more than enough to pay the execution and officer's fees. *Held*, that judgment for the full value of the property in case a return thereof could not be had was erroneous; that the recovery, inasmuch as the transfer was valid as between the parties thereto, and so plaintiffs occupied the position of general owner, should have been limited to the amount of defendant's lien.

Buck v. Remsen (84 N. Y. 383), limited.

(Argued January 26, 1883; decided February 9, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 29, 1882, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

*See Code of Civil Procedure, § 2302.

Statement of case.

This action was brought to recover the possession of certain personal property, consisting of a stock of millinery goods. It was originally brought against Nicholas H. Haynes, the present defendant's intestate.

Plaintiffs claimed title under two bills of sale executed by Mrs. Lucy A. Michelson. Defendant justified under a justice's judgment against Mrs. Michelson, and a levy by virtue of an execution issued to him as constable upon said judgment. He claimed that the bills of sale were fraudulent and void as to creditors. The findings and the facts as to the bills of sale and the judgment so far as material are stated in the opinion.

The property in question was taken under process from defendant and delivered to plaintiffs. The value of the property, as found, was greater than the amount of the execution and defendant's fees. The referee directed judgment for a return of the property, or in case a return could not be had, for payment of its full value. Judgment was entered accordingly.

Cornelius E. Stephens for appellants. The judgment in favor of Johnson was void. The justice had no jurisdiction of the person of defendant. (Old Code, § 64, subd. 15; 3 R. S. [6th ed.] 402, § 11; *Lester v. Crary*, 1 Denio, 81; 2 Wait's Practice [1st ed.], 256; *Binney v. Le Gal*, 19 Barb. 492; *Everson v. Gehrman*, 10 How. Pr. 301; *Tenny v. Filer*, 8 Wend. 508, 569; 3 R. S. [Banks' 6th ed.] 402, title 4, part 3, §§ 9, 10, 39, 44, 46; *Sperry v. Reynolds*, 5 Lans. 412; 65 N. Y. 179; *Dobson v. Pearce*, 12 id. 164-6; *Pixley v. Phœnix B'k*, 83 id. 337; *Ferguson v. Crawford*, 70 id. 254; *Sagendorf v. Shult*, 41 Barb. 102, 107-8; 2 R. S., part 3, chap. 3, title 4, §§ 11, 12, marg. p. 227; id., § 12, subd. 3.) A judgment of an inferior court must show jurisdiction on its face, or it is void. (*Frees v. Ford*, 8 N. Y. 176; *Simmons v. De Barre*, 8 Abb. Pr. 269.) The referee erred in allowing defendant the total value of the goods. His right of recovery was limited to the amount of his judgment and execution, with interest and poundage. (Crocker on Sheriffs [2d ed.], § 836, p. 303; *Allen v. Judson*, 71 N. Y. 77.)

Opinion of the Court, per ANDREWS, J.

A. P. Smith for respondent. The parties, having submitted to the jurisdiction of the justice, are estopped from denying that he had jurisdiction. (Code Pro., § 64, subd. 15; 2 Wait's Law and Practice, 54, 55, 57, 1 Cow. Tr. 587; 3 R. S. [6th ed.] 402, § 9.) If the judgment were irregular it could not be attacked for that irregularity, in this collateral way, in an action against an officer whose process is regular on its face. (*Griffin v. Mitchell*, 2 Cow. 548; *Wesson v. Chamberlain*, 3 Comst. 331; *Skinnion v. Kelley*, 18 N. Y. 355; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 275; *Brown v. Nichols*, 42 N. Y. 26.) In actions of this kind, if the defendant succeeds, he is entitled to a judgment for the return of the property, or the payment of its value, and is not limited to the amount of his execution and costs thereon. (*Buck v. Remsen*, 34 N. Y. 353.)

ANDREWS, J. The plaintiffs cannot maintain their alleged title, under the bill of sale from Mrs. Lucy A. Michelson to Bernherd Browner, dated November 22, 1878, and subsequently assigned to them, against a subsequent judgment and execution creditor of Mrs. Michelson. The referee finds that the bill of sale was made with intent to hinder, delay and defraud Mrs. Michelson's creditors, and that the plaintiffs had notice of its fraudulent character, at the time they took the assignment. So also, upon the facts found by the referee, the plaintiffs derived no title to the property under the bill of sale to them from Mrs. Michelson, of December 6, 1879. It is found that that bill of sale was executed on the express understanding and agreement, and as a condition precedent to its having any effect, that the plaintiffs should execute to Mrs. Michelson an agreement in writing, to allow her to remain in possession of the goods and to conduct the business as she had theretofore done, until she had time to realize from the stock sufficient to pay the plaintiff's claim of \$161.12, and also the claim of Bronner, of \$184.40.

The evidence shows that the bill of sale was executed to the plaintiffs on the afternoon of Saturday, December 6, 1879. When the bill of sale was delivered to the plaintiffs, no inven-

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tory of the goods had been taken, and on the evening of that day the parties proceeded to take an inventory. But the transaction was left incomplete. The giving of the bill of sale, and the execution of the defeasance were intended to be concurrent acts, and the execution of the latter was deferred because the attorney for the defendant, by reason of other engagements, and on account of the lateness of the hour, was unable to draw it, and upon the plaintiffs' suggestion that he would send it down on the Monday following. It was not the case of an absolute delivery of a bill of sale, the vendor relying upon the promise of the plaintiff to perform his part of the undertaking at a subsequent period. The possession of the goods was not transferred to the plaintiffs, and until the performance of their agreement to give the written defeasance they acquired no title to the property. (*Russell v. Minor*, 22 Wend. 659; *Leven v. Smith*, 1 Denio, 571.) It is not material that the transaction would operate as a mortgage simply, and not as an absolute sale, in case there had been merely a parol agreement that it should constitute a mortgage. It was a prudent and proper precaution on the part of Mrs. Michelson that she should have written evidence from the plaintiffs of the condition under which it was given, and as the execution of a defeasance in writing, was made by her an essential part of the transaction, the refusal of the plaintiffs on subsequent demand by her, before the levy, to perform the contract in that respect, terminated their rights under the agreement.

It becomes material, however, to pass upon the question raised as to the validity of the judgment and execution under which the defendant's intestate levied upon the property, because, although the bill of sale to Bronner was void as against the creditors of Mrs. Michelson, it was nevertheless good as between the parties, and could only be assailed by one having a valid judgment and execution against Mrs. Michelson. The judgment was rendered in an action in favor of James G. Johnson, as surviving partner of Johnson Brothers & Co., against Mrs. Michelson by a justice of the peace on the 11th day of Decem-

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ber, 1879, the same day on which a summons was issued and served upon the defendant therein, but after the service of the summons and its actual return by the constable to the justice, with a proper certificate of service, and upon the appearance by attorneys for the respective parties, who duly swore to their authority to so appear. The plaintiff on such appearance filed his complaint in writing, and thereupon the defendant's attorney made an offer in writing to allow judgment to be taken against him in favor of the plaintiff for the amount claimed in the complaint, which offer was thereupon duly accepted in writing by the plaintiff's attorney, and judgment was thereupon entered. The authority to render a judgment under these circumstances depends upon the construction of subdivision 15, section 64 of the Code of Procedure (Chap. 459, Laws 1860), which provides that in actions before a justice of the peace the defendant, on the return of process, and before answering in the action, may make a written offer of judgment, and that the plaintiff shall thereupon, before any other proceeding shall be had, determine whether he will accept or reject such offer, and authorizes the justice, in case the plaintiff accepts such offer in writing, to file the offer and acceptance, and render judgment accordingly. It is claimed on the part of the plaintiffs that the words "on the return of process," authorize this proceeding to be taken only on the return day of the process. But we are of opinion that this construction cannot be maintained. A suit may be instituted before a justice, either by the voluntary appearance and agreement of the parties, or by process (2 Rev. Stat., 227, § 11), and, if instituted by summons, it is considered to be commenced on the day when the process shall be delivered to the constable, and when instituted without process at the time of the parties joining issue (*id.*, § 12). The justice had jurisdiction of the subject-matter, and also of the person of the defendant, Mrs. Michelson, by the service of process, although he could not without her consent render a judgment until the return day mentioned in the writ. But the justice having acquired jurisdiction of the subject-matter and of the person, it was competent for the parties to waive the time

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mentioned in the summons, and by consent proceed to trial, or take any other proceeding prior to the return day of the summons. The object of the provision of the Code referred to was to allow the defendant, by making an offer of judgment, to save himself further costs in case the recovery should not exceed the offer, and the requirement that the offer should be made before answer was designed to protect the plaintiff against being put to his election by an offer made after issue, or during the progress of the trial. But neither the language of the statute, nor the reason upon which it is founded, points to the return day of the process as the earliest period when the right given can be exercised. The justice having jurisdiction of the subject-matter, and of the person of the defendant, was authorized upon the actual appearance of the parties in anticipation of the return day of the process, and the making and acceptance of the offer, to forthwith render judgment. The appearance was in the action already commenced, as distinguished from a voluntary appearance without process, and all the proceedings were in such action. We are also of opinion that the authority of the defendant's attorney to appear in her behalf, empowered him to make the offer of judgment. All the incidents to such authority attached thereto, and among others to bind the principal by any proceedings which the principal herself might take therein, and it was not necessary that in addition to his swearing to his authority to appear generally for her, he should have further sworn to his authority to make the offer of judgment.

The judgment was, therefore, regular, and the constable to whom the execution was issued, having levied upon the property, was entitled to hold it under the execution. But we are of opinion that the judgment should have limited the sum required to be paid by the plaintiffs, in case the delivery of the property could not be had, to the amount of the execution and the fees of the officer. Although the bill of sale to Bronner was void as to creditors of Mrs. Michelson, it was, nevertheless, as has been said, good as between the parties. The general rule is that in an action for the conversion of

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chattels, brought against the general owner by a person holding a lien upon the property taken or converted, the plaintiff's recovery is limited to the amount of his lien; but if the action is against a stranger, having no interest in the property, the plaintiff will be allowed to recover its full value, and he will hold the balance of the property beyond the amount necessary to satisfy his claim in trust for the true owner, and as in this case the defendant's intestate had no interest, except by virtue of his lien, it is contrary to principle that he should be allowed to recover, as against the plaintiffs, who, for this purpose, occupy the position of general owners, beyond the amount of his claim. The defendant relies upon the case of *Buck v. Remsen* (34 N. Y. 383) to support the judgment for the full value of the property. That was an action, by the holder of a lien, against the general owner, and the court seem to have acquiesced in a recovery by the plaintiff, of the full value of the property, which exceeded the amount of the lien. But the point, as the case shows, was not insisted upon by the defendant, nor did the question appear to have been much considered, and the authorities cited in the opinion, recognize, and are based upon the distinction between an action brought against a general owner of property, and one brought against a stranger, by a person claiming a lien upon the property. The later case, in this court, of *Allen v. Judson* (71 N. Y. 77) affirms the distinction in question, and is an authority against the recovery, in this case, of the full value of the property. We are of opinion, therefore, that the judgment should be modified by limiting the recovery of the defendant, in case the return of the property shall not be had to the amount of the execution and the costs, and as so modified, affirmed, without costs, in this court.

All concur, except RUGER, Ch. J., taking no part.

Judgment accordingly.

Statement of case.

HENRY BOSTWICK, Receiver, etc., Respondent, v. SAMUEL L. VAN VOORHIS, Executor, etc., Appellant.

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An official bond given by B., upon his appointment as cashier of a bank, was conditioned "that he shall honestly and faithfully discharge the duties of such cashier, rendering at all times his undivided care and services to said bank, and shall obey the orders and directions of the president and directors of said bank lawfully given, and shall at all times account for and pay over all moneys * * * belonging to said bank, and shall keep true and accurate books," etc. The complaint in an action upon the bond, after averring specifically non-performance of each and all of the conditions alleged, that on the contrary thereof B. paid out the moneys of the bank fraudulently to various persons without any sufficient vouchers or security therefor, and fraudulently permitted various persons to overdraw their accounts without any security, and fraudulently altered and falsified the accounts and books of the bank so as to conceal such frauds, and has refused to pay over to the president and directors large sums of money, to-wit: \$100,000. *Held*, that these allegations were a sufficient compliance with the provision of the Revised Statutes (2 R. S. 378, § 5), providing that in an action for the breach of a condition of a bond, other than for the payment of money, the "declaration shall assign the specific breaches for which the action is brought;" also that if insufficient no reason was thereby furnished for a dismissal of the complaint, as defendant could have applied by motion to have them made more definite and certain, or for a bill of particulars.

The action was brought by the receiver of the bank who produced the bond. It appeared that B. was chosen cashier by resolution of the board of directors, passed January 17, 1869, and at the same time his bond was fixed at \$30,000, with sureties "to be approved by the board." The amount stated was that of the bond in suit, which was dated January 30, 1869; it was executed by B. and six sureties, three of whom, including defendant's testator, were directors of the bank, and was witnessed by the then teller of the bank, who on the same day proved its execution before a justice of the peace, who was also a director. B. thereupon entered upon the discharge of his duties and continued to act as cashier until January, 1877. No direct evidence was given that the bond was ever delivered to or that it was ever in possession of the bank, or that the sureties were formally approved. It appeared that in 1873, one of the sureties wrote to one of the directors expressing a wish no longer to be bondsman for B., and that this letter was produced and read at the next meeting of the board of directors. *Held*, that it was a fair and legal inference from the facts that the bond was at or about its date delivered to and accepted by the bank; and that an express approval in writing was not necessary to make the bond binding.

Statement of case.

B. was teller of the bank before he was appointed cashier. It was claimed that before such appointment, the directors were aware of certain misconduct on his part as teller which they concealed from the sureties. The misconduct complained of did not affect the moral character or official fidelity of B. *Held*, that the objection was untenable; that mere irregularities or omissions of duty, even if known to the directors, furnished no ground for a defense.

Before a bond in such a case can be avoided, fraud and bad faith, which has misled the surety to his damage, must be brought home to the obligee by clear and decisive evidence.

It appeared that the predecessor of B. in the office of cashier was also a defaulter. *Held*, that concealment of this fact from the sureties did not affect their liability as it in no way increased or related to the obligations assumed.

It was claimed that by the notice above referred to given by one of the sureties, of his desire to be released, he and the other sureties were relieved from liability for subsequent defaults by B. The notice was communicated to the board of directors November 8, 1878. It appeared that before the close of that month, the defalcation of B. amounted to more than the penalty of the bond. *Held*, that whatever might be the effect of such a notice, it could not operate immediately, but the bank had reasonable time, thereafter, to act, to notify the cashier and procure a new bond; and, therefore, that the notice did not affect the liability of the sureties.

It was claimed that defendant's testator was released, because of misconduct and embezzlement of B. in 1874. It did not appear that the directors had any knowledge that the action of B. complained of was fraudulent or dishonest. *Held*, that the objection was untenable; that if the directors were guilty of any negligence in not learning of the misconduct of B., defendant's testator, as one of them, was equally guilty with the others.

(Argued January 29, 1883; decided February 9, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 12, 1882, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Milton A. Fowler for appellant. It was necessary for plaintiff to assign in his complaint specific breaches of the bond. (2 Edm. Stats. 392; *Beers v. Shannon*, 73 N. Y. 292—

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303.) The bond was never approved as to its sureties by the board of directors and hence the contract was incomplete and never became effective. (*Franklin B'k v. Cooper*, 36 Me. 179; *B'k of U. S. v. Dandridge*, 12 Wheat. 64; *Graves v. L. N. B'k*, 10 Bush, 23.) The misconduct of Bartow in concealing and covering for years the large default of the former cashier, which misconduct became known to the bank through its governing body, before the appointment of the cashier, constituted a want of good faith in the bank in giving to Bartow the indorsement of an appointment. (*Franklin B'k v. Cooper*, 36 Me. 179-197; *Phillips v. Foxhall*, 7 Q. B. 666, 674; *Railton v. Matthews*, 10 C. & F. 394; *Howe Machine Co. v. Farrington*, 82 N. Y. 121, 125; *Smith v. B'k of Scotland*, 1 Dow. Parl. R. 272; *A. & P. Tel. Co. v. Barnes*, 64 N. Y. 385.) The bank, as a corporation, was guilty of concealment and misrepresentation of its true condition in material matters, at and about the time of the appointment of Bartow as cashier, and the sureties are not liable. (*N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30-50; *Goodspeed v. E. H. B'k*, 22 Conn. 341; *Frankfort B'k v. Johnson*, 24 Me. 490; *Graves v. L. N. B'k*, Thomp. Nat. B'k Cases, 492; 1 Story's Eq. Jur., § 215.) The letter sent by Beverly Haight on the 31st of October, 1873, to Lewis H. White, vice-president of the bank, and by him presented to the board of directors, November 8, 1873, terminated his liability, if any existed, as to all acts occurring after that time. (*Howe Machine Co. v. Farrington*, 82 N. Y. 121-125.) The contract of guaranty is one of strict legal liability, and liability can in nowise be inferred. (*Myers v. U. S.*, 1 McLean, 493-495; 9 Cranch, 227-229.) When the principal discovers a default on the part of his employe or agent, it is his duty to at once notify the sureties of such default and make claim upon them for the damages he has sustained. If he does not so do, and chooses to continue the agent in his employ, he thereby avoids the bond as to all future misconduct of the agent. (Morse on Banking, 230-1, 234-5; *Phillips v. Foxhall*, 7 Q. B. 666; *Sanderson v. Aston*, 8 Exch. 73; *Burgess v. Eve*, 13 Eq. 450; *A. & P. Tel. Co. v. Barnes*, 64 N. Y. 385.)

Statement of case.

John Thompson for respondent. Every presumption is in favor of the approval of the bond by the directors when presented, as otherwise the cashier could not have acted as such under the resolution, that a sufficient bond should be given. (*Abbott's Trial Evidence*, 37, § 34; *B'k of U. S. v. Dandridge*, 12 Wheat. 64; *Dedham B'k v. Chickering*, 3 Pick. 335; *Amherst B'k v. Root*, 2 Metc. 522; *Union B'k v. Ridgley*, 1 H. & G. 324; 1 *Morse on Banking*, 223, 235; *Mead v. Keeler*, 24 Barb. 20.) It is not necessary that the cashier's bond should be officially approved. (*Morse on Banking*, 235.) If the breaches assigned in the complaint were not sufficiently specific, the defendant's remedy was to apply, by motion, to have them made more specific before answering. (*Hart v. Seixas*, 21 Wend. 40.) The officers of the bank are under no obligations to investigate the books, when a bond is given; and their failure to do so constitutes no defense to an action on the bond unless the surety at the time requested such examination, and it was refused. (*Wayne v. Com. Nat. B'k*, 52 Penn. St. 343; *Thompson's Nat. B'k Cases*, 614 and notes; *A. & P. Tel. Co. v. Barnes*, 64 N. Y. 385; *Casoni v. Jerome*, 58 id. 316; *Supers. v. Otis*, 62 id. 88; *Atlas B'k v. Brownell*, 9 R. I. 168; 11 *Am. Rep.* 231.) A surety on the bond of a cashier of the bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, even if they were guilty of gross negligence in not discovering it. (*Tapley v. Martin*, 116 Mass. 275; *Thompson's Bank Cases*, 611.) Unless the directors knew of the irregularities of the former cashier as a fraud, and not simply as an irregularity, the sureties would not be discharged. (*Amherst B'k v. Root*, 2 Metc. 522; *Minor v. B'k of Alexandria*, 1 Pet. 46; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Franklin B'k v. Stevens*, 39 Me. 532; *Farrington v. Stanley*, 60 id. 475; *Graves v. Lebanon B'k*, 10 Bush [Ky.], 23; *B'k of U. S. v. Elting*, 11 Wheat. 59; *Sup'rs v. Otis*, 62 N. Y. 88; *Morse on Banking*, 231; *State B'k v. Chatwood*, 3 Halst. 1.) No neglect or carelessness on the part of the directors in examin-

ing into the cashier's accounts would discharge the sureties. (*Tapley v. Martin*, 116 Mass. 275; *Thompson's Nat. B'k Cases*, 611, 616.)

EARL, J. This action was brought by plaintiff, as receiver of the National Bank of Fishkill, against the defendant, as sole executor of Coert A. Van Voorhis, deceased, who was one of the sureties upon the official bond of Alexander Bartow, cashier of the bank. The bond was joint and several and was signed by Bartow and six sureties, and the conditions thereof were as follows: "Whereas the above bounden Alexander Bartow has been duly appointed cashier of the said National Bank of Fishkill: Now if the said Alexander Bartow shall well, honestly and faithfully discharge the duties of such cashier, rendering at all times his undivided care and services to said bank, and shall obey the orders and directions of the president and directors of said bank lawfully given, and shall at all times account for and pay over all moneys which have come, now are, or hereafter may come into his hands, belonging to said bank, and shall keep true and accurate books of all the affairs of the said bank intrusted to him, then the above obligation to be void, or else to remain in full force and virtue."

Upon the argument before us several objections to the recovery were urged upon our attention, which we will consider separately. *First*. It is said that the complaint should have been dismissed because it did not assign specific breaches of the bond. This objection is based upon section 5, article 2, title 6, chapter 6, part 3, of the Revised Statutes, which provides that "when an action shall be prosecuted in any court of law upon any bond for the breach of any condition, other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought." The counsel for both parties assumed that this provision of the statutes was in force when this action was commenced in 1877; and without determining whether it was or not, we

think it was sufficiently complied with. It was alleged in the complaint that Bartow did not honestly and faithfully discharge his duties as cashier; that he did not render at all times his individual care and services to the bank; that he did not obey the directions of the president and directors of the bank, lawfully given; that he did not at all times account for and pay over all moneys which came into his hands belonging to the bank, and did not keep true and accurate books of all the affairs of the bank intrusted to him; but that on the contrary thereof, he paid out the moneys of the bank fraudulently to various persons, without any sufficient vouchers or security therefor, and fraudulently permitted various persons to overdraw their accounts without any security, and fraudulently altered and falsified the accounts and books of the bank so as to conceal such fraudulent doings, and that he has refused to pay over to the president and directors of the bank large sums of money, to-wit, \$100,000 and over, refusing to account for the same, to the damage of the bank \$100,000.

These allegations of breaches of the bond on the part of Bartow were a sufficient compliance with the statute. If they were not, no reason was thereby furnished for dismissing the complaint. The defendant could have applied to the court by motion, to have them made more specific and definite or for a bill of particulars.

Second. It is claimed that the complaint should have been dismissed because there was no evidence that the bond was ever delivered to, or accepted by the bank, or in its possession. Bartow was chosen cashier of the bank by a resolution of the board of directors on the 17th day of January, 1869, and at the same time his bond was fixed at \$30,000, with sureties "to be approved by the board." The bond is dated January 30, 1869. It was executed in the presence of a witness, who was then teller of the bank, by Bartow and six sureties, three of whom, including the defendant's testator, were then directors of the bank, and its execution was proved by the witness on the same day before a justice of the peace, who was also a director of the bank. After his appointment, and after

the execution of the bond, Bartow entered upon the discharge of his duties as cashier, and continued to act as such until January, 1877. There is no direct evidence that the bond was ever delivered to the bank, and no witness was called to prove that it was ever in the possession of the bank. The receiver obtained possession of it some time after his appointment in the year 1877, and he brought this action upon it and produced it upon the trial of the action. On the 31st of October, 1873, one of the sureties addressed a letter to one of the directors, in which he expressed a wish no longer to be bondsman for Bartow, and that letter was by the director produced at the next meeting of the board of directors, soon thereafter held, and was there read, but the directors took no action thereon. It is to be inferred that the bond was then in the possession of the bank; and from all the facts, that Bartow was required, as one of the conditions of his appointment, to give the bond, that he entered upon the discharge of his duties, and continued for about eight years to discharge them; that the bond was found before the commencement of this action and on the trial thereof, in the possession of the plaintiff, who would be the legal custodian thereof, if it was after his appointment found in the bank, it is a fair, just and legal inference that it was at or about the time of its date actually delivered to, and accepted by, the bank. It was in the precise sum and in the form required by the resolution of the board of directors. It was executed for the purpose of delivery to the board. It was the duty of the board to take it, and they manifested an intention, by resolution, to discharge their duty. It cannot be presumed that in violation of their expressed purpose the directors did not take, receive and approve the bond. From the fact that the plaintiff, representing the bank, had the bond, which had been executed in the manner and under the circumstances mentioned, in his possession soon after his appointment as receiver, the inference, in the absence of countervailing proof, is certainly allowable that he found it among the papers and assets of the bank, and that it thus came lawfully into his possession. The circumstance that no entry is

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found in the minutes of the board of directors showing that the bond had been received and approved is not, without other proof, of much significance. An express approval of the bond in writing was not necessary in order to make it binding upon Bartow and his sureties. If it was actually delivered to and received and held by the bank, there was a sufficient approval and acceptance thereof.

These views are sufficiently sustained by the *Bank of the United States v. Dandridge* (12 Wheat. 64); *Graves v. Lebanon Nat. B'k* (10 Bush, 23; 19 Am. Rep. 50); *Morss on Banking* (2d ed.), 235, and cases cited. The rule to be formulated from these authorities is, that the fact of the possession by the bank of such a bond, in due form, legally executed and complete in every respect, the officer having been allowed to enter upon his duties, is evidence which of itself will suffice to authorize a suit upon it as having been delivered, accepted and approved with all requisite formality.

Third. Bartow was teller of the bank before he was appointed cashier thereof, and it is claimed that the directors, before his appointment as cashier, were aware of certain misconduct of his as teller, which they concealed from the sureties, and which they were bound, acting in good faith, to have made known to them. It is undoubtedly true that if the directors had knowledge that Bartow had been dishonest and unfaithful in his office as teller, they were bound to apprise the sureties of that fact, otherwise they could not hold them. But mere irregularities or omissions of duty on the part of Bartow while he was acting as teller, which did not affect his moral character or his official integrity and fidelity, even if known to the directors, would not enable the sureties to defend upon the ground that they had been deceived. Sureties are supposed to know the character of their principal, and to be willing to be bound for his fidelity. They must inquire and inform themselves of all the facts they desire to know, and if they omit to seek for or obtain the requisite information, they cannot easily avoid the bond upon inferential or unsatisfactory proof that they were drawn into signing it by bad faith on the

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part of the obligee. Before a bond in such a case can be avoided, the fraud and bad faith should be brought home to the obligee by quite clear and decisive evidence, otherwise bonds of this character will furnish a very precarious security to the parties who take them. In *Tapley v. Martin* (116 Mass. 275), it was said: "The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the officers or agents of the bank, and such negligence does not discharge the sureties;" and it was held that the surety upon the bond of the cashier of a National bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them. In *Atlantic and Pacific Telegraph Co. v. Burnes* (64 N. Y. 385; 21 Am. Rep. 621), it was held that "the sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming into his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal, known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee." In *B'd of Supervisors v. Otis* (62 N. Y. 88), it was held, that "mere laches on the part of an obligee or creditor, or non-performance of some act which might prevent loss to a surety, will not, in the absence of some express covenant or condition, discharge the surety. To be available to him as a defense, the neglect must be some positive duty owing to him." In *Atlas Bank v. Brownell* (9 R. I. 168; 11 Am. Rep. 231), an action on a cashier's bond, it was held, that to avoid a bond on the ground of fraud on the part of the bank, or its directors, there must be a fraudulent concealment of something material for the surety to know. A concealment which will avoid a guaranty must be a fraudulent one. If not fraudulent in fact or

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in law the defense is not made out; and in Story's Equity Jurisprudence (§ 204), it is said that "the concealment to make void a contract must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent." It is perceived from these authorities that the law simply requires from the obligee to sureties upon a bond good faith. He must not intentionally mislead them by what he says or does, or omits to say or do, and bad faith only on his part, which has misled the surety to his damage, will enable the surety to defend against the bond.

In this case, the claim is that the cashier who preceded Bartow had for some years been a defaulter to the bank, and that Bartow, as teller, aided in concealing and covering up the defalcation for years. The answer to this is that it does not appear, and was not found by the referee, that in any thing Bartow did in reference to the accounts and transactions of the former cashier he acted dishonestly or fraudulently, or that he knew the bank was to suffer any wrong or injury from the cashier's conduct. There was nothing in what Bartow did as a subordinate of the cashier, in reference to the cashier's accounts and transactions with the bank, showing that he was intentionally dishonest or unfaithful to the trust reposed in him by the bank; and such evidently was the view of the facts taken by the directors when, with full knowledge of all the facts, they appointed him cashier. Upon such facts it is quite clear that the sureties upon the bond are unable, within any authority that can be found, to avoid the bond on the ground of fraud.

Neither was there any thing in the condition of the bank growing out of the supposed defalcation of the former cashier which the directors were bound to communicate to the sureties. It was not certainly known at the time Bartow was appointed cashier, so far as we can learn from the evidence, that the bank would lose any thing on account of the transactions of the former cashier with the bank; and it subsequently turned out that if it lost any thing, the loss was not large. It

was not of the least importance that the sureties should have any knowledge in reference to the accounts of the former cashier as the state of his accounts with the bank in no way increased, affected or related to the liability which they assumed by their bond.

Fourth. On the 31st of October, 1873, Beverly Haight, one of the sureties, addressed a letter to White, one of the directors and vice-president of the bank, of which the following is a copy: "I wish no longer to be bondsman for Mr. Bartow. I am old and my health is poor. I notified Mr. Bartow last February that I did not wish to be bondsman any longer." White produced this letter at the next meeting of the board of directors held soon after its date, and it was read to the directors; but they took no action thereon. The claim is made, that by that notice Haight was discharged from his liability as surety upon the bond for the defaults thereafter committed by Bartow, and so the referee held as matter of law; but he further held that the notice contained in that letter did not discharge the defendant's testator or the defendant, as his legal representative, from liability for all of Bartow's defaults. It is not now important to determine whether the referee was right or not in his conclusions of law as to the effect of Haight's notice and discharge, because his findings show that prior to this notice, Bartow's default was more than \$30,000; and hence this recovery can be upheld without, in this action, charging the defendant with any defaults, or breaches of the bond, committed by Bartow, after the 8th day of November, 1873, when the notice was communicated to the board of directors. Whatever the effect of such a notice may be it cannot operate instantaneously. The directors, after receiving it, must have a reasonable time to act, to give notice to the cashier and the other sureties, and to procure a new bond. If the effect of the notice is to be such as is now claimed on the part of the appellant, that is, if it discharged Haight, and in consequence thereof discharged all the other sureties, the instant it was communicated to the bank, it might be quite embarrassing and damaging to the bank. The cashier might be so situated that the

directors could not immediately arrest his discharge of duty or his ability to bind the bank ; and hence reasonable time, at least, must be given to the bank in such a case to act after receiving the notice. It abundantly appears that before the close of November, 1873, the default which the referee found the cashier had committed amounted to more than \$30,000. It is unnecessary for us to go minutely into the evidence for the purpose of showing that the findings of the referee were sanctioned by the evidence.

Fifth. We have carefully examined the claim made on the part of the defendant, that his testator was released from liability upon the bond on the ground of misconduct and embezzlement on the part of Bartow in 1874, which then became known to the directors of the bank, and was then concealed from the defendant's testator and the other sureties upon the bond. This claim is based upon a transaction by which Bartow took \$60,000 of the bonds of the Fishkill Savings Institute, of which he was an officer and pledged them as security for an overdraft of the National Bank of Fishkill with the Merchants' Exchange National Bank of New York. But it does not appear, and was not found by the referee, that the directors of the Fishkill National Bank had any knowledge that the transaction of Bartow in reference to these bonds was fraudulent or dishonest. They may well have supposed from the facts within their knowledge that the Fishkill National Bank had advanced to the Savings Institute large sums of money, for which the institute was indebted to the bank, and that these bonds were taken and pledged for the purpose of reimbursing the bank for the moneys thus advanced. The defendant should have some finding of knowledge on the part of the directors which they were bound in good faith and conscience to communicate to the sureties. There is no such finding, and there are no such facts upon which an imputation of bad faith on the part of the directors, in reference to that transaction, can be imputed to the bank. If the directors were guilty of any negligence in not learning or knowing of the misconduct of Bartow at that time, then the

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defendant's testator, as one of the directors, was equally guilty with the others.

Without a more extended or minute discussion of the facts of this case it is sufficient further to say, that we have carefully considered all the evidence and all the allegations of error, and we are of opinion that the decision of the referee was justified by the law and the facts.

The judgment should be affirmed.

All concur.

Judgment affirmed.

ELIZABETH MELTZER, Executrix, etc., Respondent, v. EDWIN N.
DOLL et al., Executors, etc., Appellants.

In an action upon a promissory note, given February 21, 1871, for \$1,000, by D., defendant's testator, to the firm of M. Bros., plaintiff gave evidence tending to show that the consideration of the note was an agreement on the part of said firm to take up and suspend prosecution, for three months, upon a note, held by them, against one G. M., who had shortly before become an involuntary bankrupt, and was then being prosecuted by some of his creditors. *Held*, that these facts furnished a good consideration for the note in suit.

The defense was, among other things, that the note was merely an accommodation one. P. M., son of G. M., was called as a witness, by defendant, to prove that defense. Upon cross-examination plaintiff was permitted to prove, by him, under objection and exception, a bill of sale, executed to him in January, 1871, by his father, of four hundred tons of coal, and a chattel mortgage, executed by himself to D., purporting to cover the personal property, aside from the coal, formerly used by G. M. in carrying on the coal business, and on the premises occupied by him for that business. *Held* no error; that the evidence was proper, as showing an intent or motive and so as affecting the credibility of the witness; also as showing the relation of the parties; *i. e.*, that D. had such an interest in the pecuniary condition of G. M. as would naturally induce him to give his own note for the debt of the latter.

Defendant put in evidence a deposition, made before a register in bankruptcy, to prove a debt, in bankruptcy, against G. M. The deposition was to the effect that on March 13, 1871, before the register, came J. M. and G. M., of the firm of M. Bros., and made oath that the person against whom the petition in bankruptcy had been filed was before such filing

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and still is "indebted to this deponent," upon a promissory note of \$1,000, given for money loaned, and that for said sum deponent had not "had or received any manner of satisfaction or security whatever." The deposition was signed by J. M., alone, and was certified by the register to have been resworn to June 5, 1871. A copy of the note was attached, which corresponded with the note, to extend and secure which the note in suit was alleged to have been given. Defendant thereupon asked to have the complaint dismissed on the ground of failure of consideration, as the note of G. M. was proved in bankruptcy within the three months. The motion was denied. *Held* no error. *First*, it was not conclusive that the two notes were identical; that no estoppel was worked as against the firm by the fact that a member thereof proved, as his own debt, a note once held by the firm. *Second*, it would seem, from the fact that the deposition was resworn to, after the expiration of the three months, the former verification was defective, and no valid proceedings were instituted within the three months. *Third*, that proof of the debt in bankruptcy would not have been such a proceeding as would have been a breach of the agreement to forbear. The *ex parte* proof in bankruptcy is not such an adjudication as to the existence of a fact as to legally preclude the person making it from afterward explaining or contradicting the statements contained therein, at least as against one not in a legal sense a party.

Costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer. *Held*, that as defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (§ 1836).

(Argued January 27, 1883; decided February 9, 1883.)

THERE were three appeals in this action. First appeal from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 11, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Second appeal from an order of said General Term, made May 11, 1882, which affirmed an order of Special Term, denying a motion for a new trial, made on the ground of newly-discovered evidence.

Third appeal from order of said General Term, made May 11, 1882, which affirmed an order of the Special Term, allowing costs to plaintiff, payable out of the estate of defendant's testator.

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The nature of the action and the material facts are stated in the opinion.

Edward Van Ness for appellants. Evidence must be confined strictly to the issue. (*O'Hagan v. Dillon*, 75 N. Y. 170.) Illegal evidence is presumed to injure the party objecting. (*Anderson v. Rome*, 54 N. Y. 314.) By admitting the evidence the jury were justified in regarding it as relevant. (*Baird v. Gillette*, 4 N. Y. 186; *Neudecker v. Kohlberg*, 81 id. 305.) The defendant's motion, at the conclusion of the case, to dismiss the complaint on the ground that plaintiff having proved the note of Merkle in bankruptcy before the three months expired, and before the maturity of the note in suit, discharged the defendants, should have been granted. (*Rosenthal v. Plumb*, 25 Hun, 336; Bankrupt Act, § 22, now § 5106; *In re Miller*, 1 N. B. R. 410; *Matthews v. Tufts*, 87 N. Y. 568, 570; Brandt on S. and G., § 361; Edwards on Notes [2d ed.], 328, 329.) Plaintiff's evidence in the bankruptcy proceedings imports absolute verity and is positively conclusive on the point that the note in suit was not taken by them on the consideration pretended. (Bankrupt Act, § 5077; *In re Strauss*, 2 B. R. 48; 1 Phillips on Ev. 453, 464 [4th ed.], C. & H. note; *Stewart v. Isador*, 5 Abb. Pr. [N. S.] 72; *Clement v. Clement*, 37 N. Y. 59; 2 Phillips on Ev.) The defendant's motion for a new trial on the ground of newly-discovered evidences should have been granted. (*Guyott v. Butts*, 4 Wend. 579.) The demand that the executors pay the note was improper; all that can be demanded is that the executors admit or reject the claim. Refusing to pay is not disputing the claim. (*Lefever v. Van Vechten*, 3 How. 201-2; *Stevenson v. Clark*, 12 id. 285.) The summons being at once served, it was the duty of the defendants to resist to the uttermost. (*Knapp v. Curtis*, 6 Hill, 388.)

Frederic A. Ward for respondent. The note in suit was a new and independent obligation, arising out of an agreement made between Doll and the Meltzers, to which Merkle was not

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a party, and given not to secure the payment of that note, but to obtain forbearance upon it for a definite period, and was given for a sufficient consideration. (*Mechs. & F. B'k v. Wilson*, 42 N. Y. 438, 442; *Burns v. Rowland*, 40 Barb. 368; *Traders' B'k v. Bradner*, 43 id. 392; *Platt v. Coman*, 37 N. Y. 440, 443; *Brooks v. Haigh*, 10 Ad. & El. 320; *Wilkinson v. Oliveria*, 1 Bing. N. C. 490; *Howland v. Howland*, 20 Penn. St. 303; *Smith v. Watson*, 14 Vt. 332.) The order granting plaintiff costs against the estate was clearly right. (Code of Civil Procedure, §§ 1836, 3246; *Harvey v. Kilman's Exr.*, 22 Wend. 571; *Field v. Field*, 77 N. Y. 296.) The appeal from the order of the General Term affirming the order denying defendants' motion for a new trial on the ground of newly-discovered evidence will not be entertained by this court. (*Scoville v. Landon*, 50 N. Y. 686; *Lawrence v. Ely*, 33 id. 42; *Bedell v. Chase*, 34 id. 386; *Tracy v. Altmayer*, 46 id. 598; *Dalrymple v. Hannam*, 54 id. 654; *Daily v. Graham*, 48 id. 658; *Harris v. Burdett*, 73 id. 136.)

RUGER, Ch. J. This action was originally brought by John Meltzer and Gottfried Meltzer, composing the firm Meltzer Bros., upon a note for \$1,000 given February 21, 1871, by Nicholas Doll, defendant's testator, to Meltzer Bros., payable three months after date.

After issue joined John Meltzer died, and the action was continued by Gottfried as surviving partner; he also died, and the present plaintiff, his executor, was then substituted as plaintiff.

The answer raised but two defenses. *First*. The statute of limitations, and *second*, want of consideration in the note, the claim being that it was an accommodation note merely.

The defense of the statute was abandoned on the trial and left, as the sole issue in the case, the question of want of consideration. Much evidence was given on either side upon this question. The plaintiffs attempting to show that the consideration of the note was an agreement on the part of the plaintiffs to take up and suspend prosecution for three months upon a note for

\$1,000 then held by them against one George Merkle, falling due February 24, 1871. It appeared that George Merkle had shortly before become an involuntary bankrupt, and was then being prosecuted by some of his creditors. These facts if established would have furnished a good consideration for the note in suit. (*Cary v. White*, 52 N. Y. 138; *Pratt v. Coman*, 37 id. 440; *The Mechanics & Farmers' B'k v. Wixson*, 42 id. 438.) The defendants gave evidence tending to controvert this evidence of the plaintiff, and to show that the note sued upon was given by defendants' testator to Meltzer Bros. as an accommodation note. The jury upon this conflicting evidence could well have found for either of the parties. They seemed to have placed the greatest reliance upon the plaintiff's evidence, as they had the right to do, and we cannot disturb their verdict. The judgment and order denying a motion for a new trial upon the minutes must be affirmed unless there was some error committed on the trial to which exception was taken.

Upon the trial there was exhibited by plaintiff's counsel to one Philip Merkle, on his cross-examination, a bill of sale, dated January 14, 1871, from George Merkle to Philip Merkle of four hundred tons of coal located at the corner of Lorimer and Montrose avenues in Brooklyn, and purporting to be for a consideration of \$3,500, and he was asked if that was made to him? This was objected to by the defendants as irrelevant and impertinent. The objection was overruled and the defendant excepted. He answered that it was. The bill of sale was then offered in evidence. This was objected to by defendant as irrelevant and impertinent. The court overruled the objection and defendants excepted. Immediately following this the plaintiff produced a chattel mortgage from Philip Merkle, the witness, to defendants' testator, Nicholas Doll, for \$5,000, dated January 16, 1871, and purporting to cover the personal property, aside from the above coal, on the premises, at the corner of Lorimer and Montrose avenues in Brooklyn, and apparently being the property formerly used in carrying on the coal business at that locality by George Merkle, and after proving the same by the witness under objection offered it in evidence.

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The defendants objected to its admissibility upon the ground that it was irrelevant and immaterial. The court overruled the objection and the defendants excepted. These exceptions are now urged to procure a reversal of the judgment. We do not think they were well taken. It was competent for the plaintiff to show an intent or motive on the part of the witness in testifying as he did on the trial which might affect his credibility before the jury. The fact that he became the vendee of his father for a large amount of property on the eve of the latter's bankruptcy, and immediately thereafter became the debtor of the defendants' testator for a large sum, might well tend to show an interest in defeating the collection of the note in question from Doll's estate, inasmuch as it would increase the claims of that estate upon the estate of George Merkle. We think also that the evidence was admissible upon the ground that it was competent for the plaintiff to show the situation and relation of the parties as bearing upon the question, whether Doll, under all of the circumstances, had such an interest in Merkle's pecuniary condition as would naturally induce him to give his own note for the debt of Merkle.

The issue, which was sharply contested, was whether the note sued upon was given for Meltzer Bros' accommodation, or to induce the Meltzers to refrain from a prosecution of Merkle while he was embarrassed by a hostile proceeding in bankruptcy? Would such a prosecution threaten to involve the interest of Doll to such an extent that he would be likely to incur some liability in order to induce the Meltzer Bros. not to join in that proceeding? It was in proof that one of the alleged acts of bankruptcy committed by George Merkle was the giving of a chattel mortgage to Nicholas Doll, which was claimed to be an illegal preference. We think the evidence in question legitimately bore strongly upon the probabilities of the theory supported by the plaintiff's evidence, and was properly received.

The defendant put in evidence a deposition by John Meltzer, one of the firm of Meltzer Bros., made before a register in bankruptcy, with a view of proving a debt in bankruptcy

against George Merkle, purporting in the body thereof to have been sworn to on the 13th day of March, 1871, but certified by the register to be re-sworn to on the 13th day of June, 1871. The portion of this deposition which it is material to the inquiry under discussion to consider is as follows: "On the 13th day of March, A. D., before me came John Meltzer and G. Meltzer, of the firm of Meltzer Bros., in the county of Kings and State of New York, and made oath, and says that the said George Merkle, the person against whom a petition for adjudication of bankruptcy has been filed, at and before the filing of the said petition was and still is justly and truly indebted to *this deponent* in the sum of \$1,000 for money loaned, for which he gave his note, payable on the 24th day of February, 1871 (copy hereunto annexed), and original shown, marked D. C. W. Said money was loaned by us on November 21, 1870, for which said sum of \$1,000, or any part thereof, this deponent says that *he* has not, nor has any person by his order or to this deponent's knowledge or belief, for *his* use, had or received any manner of satisfaction or security whatever." The formal facts of a proof of debt followed, after which the deposition is signed and certified as follows:

"JOHN MELTZER, Deposing Creditor.

"Subscribed and sworn to before me,

"D. C. WINSLOW, Register in Bankruptcy.

"Re-sworn June 5, 1871.

"D. C. WINSLOW, Reg."

Attached to this deposition is a copy of a note dated November 21, 1870, for \$1,000, payable three months after date to Meltzer Bros., and signed Geo. Merkle. The introduction of this deposition closed the evidence, and thereupon the defendants asked the court to dismiss the complaint on the ground that, "before the three months expired on which they claim the note in suit was given, the plaintiff proved the note of Merkle in bankruptcy, therefore it was a failure of consideration." This motion the court denied, and the defendants excepted. We think the defendants were not entitled to the rul-

ing asked for. While it was competent for one member of a firm, on behalf of the firm, to prove a debt in bankruptcy due to the firm, yet in order to make it conclusively appear to be the debt of the firm, the deposition should so state. When such a deposition is made by one person, and he states the debt to be due to himself individually, we know of no rule of construction by which we can be required to hold that he has proved a firm debt. This deposition must be held to be the act of John Meltzer alone, and where the word "deponent" is used in it to refer to the person, and to that person alone, who makes the deposition. If this note which John Meltzer testified was due to himself individually, and that he had no manner of security therefor, can here be assumed to be the note of similar date and amount which was shown to have been at one time held by Meltzer Bros., and for which they probably did hold some security, or if we are bound to assume that there had been no arrangement made between Doll and the Meltzer Bros. by which John became the individual owner of the original Merkle note, it would present very strong evidence for the consideration of the jury upon the question as to whether the Doll note was given as an accommodation note or not, and also upon the incidental issue as to whether the Doll note was given to secure the payment of the Merkle note to the Meltzer Bros. The jury had this evidence before them, presumably gave it such weight as they thought it entitled to, and for some reason found a verdict against the defendants' theory of the transaction. Their verdict might properly have been placed upon the ground that the two notes were not identical, and perhaps upon the ground that the note had by some arrangement become the property of John Meltzer. There is no method by which we can determine the theory upon which they based their verdict.

We cannot assume, upon the facts shown by this record, that the note, to extend payment of which the note in suit was given, is the same note described in John Meltzer's deposition in bankruptcy as belonging to him, nor, but that John Meltzer had become the lawful owner of the Merkle note. It is not

even impossible but that two notes for the same amount were given by George Merkle to the Meltzer Brothers on the same day. No evidence was given from which we are precluded from drawing such an inference, if necessary to support this judgment. These facts do not present a question of law such alone as it is the province of this court to consider.

No estoppel as against the representatives of the Meltzer Bros. in favor of the defendants here, is worked by the fact that John Meltzer proved in bankruptcy as his own debt a note once held by the firm against George Merkle.

The *ex-parte* proof in bankruptcy is not such an adjudication as to the existence of a fact as to legally preclude the person making it from afterward explaining or contradicting the statement therein contained, especially as against one who was not in a legal sense a party to that proceeding. It is of the essence of an estoppel by adjudication that it should be mutual.

Second. It would seem from the fact that this deposition was re-sworn to on the 5th day of June, 1871, more than three months after the agreement to forbear, that the former verification, if any was made, was defective. It would necessarily follow from this fact that no valid proceeding had been taken by the Meltzers upon their note within the three months delay agreed upon between Doll and the Meltzers.

Third. We are further of the opinion that the proof of the debt in bankruptcy by the Meltzer Bros. would not have been such a proceeding upon the note in question as would have been a breach of their agreement with Doll to forbear prosecution of the Merkle note; such a proceeding, being for the benefit of Doll alone, we might well presume, was taken at his request.

The questions discussed cover all of the exceptions taken on the trial, and the views we entertain of them lead to affirmance of the judgment, and the order denying the motion for a new trial upon the minutes.

The appeal from the order denying the defendants' motion for a new trial upon newly-discovered evidence should be dismissed.

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We have repeatedly held that such an order is not appealable.

An appeal was also taken by the defendant from an order imposing costs in the action upon the estate of his testator. This order was granted under sections 1835 and 1836 of the Code of Civil Procedure for the reason that the defendants had refused to refer the claim. Two objections were made to this order.

First. It is said that the evidence did not establish an offer and refusal to refer. We have examined the affidavits used on the motion, and think that not only as to the fact of an offer and refusal to refer, but as to the form of the offer, they tended to establish all that the law required. It is true that the defendants' affidavits controverted the fact as to an offer and refusal, but this made simply a question of fact which the Special Term have decided, and their decision is conclusive upon us.

Second. The order in this case exempts the executor from the payment of costs personally, and he is not, therefore, injured and cannot be heard to complain of the absence of the certificate of the judge or referee who tried the case.

The order should be affirmed.

All concur.

Judgment and order accordingly.

HERMAN VEEDER, Appellant, v. JOHN L. JUDSON et al.,
Respondents.

In an action brought by plaintiff as creditor of a manufacturing corporation, on behalf of himself and other creditors, against the stockholders, to enforce the liability imposed by the General Manufacturing Act (§ 12, chap. 40, Laws of 1848) upon stockholders, a judgment was entered authorizing and directing the county treasurer to docket judgments against the stockholders for the maximum amount of their possible liability, and to collect thereon, by execution, enough to pay the claims of creditors, as proved, and their costs, and out of the

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payments to him to retain his lawful commissions, and distribute the residue to those entitled. The commissions of the county treasurer were stated in plaintiff's bill of costs, and taxed as an item of disbursements. *Held* error; that the county treasurer was authorized in issuing executions, for the purpose of providing enough to pay creditors, to include his commissions and they were not properly chargeable as plaintiff's disbursements.

Certain of the papers in the case were printed upon the request of the attorneys for some of the defendants and by direction of the referee, the expense was taxed as an item of disbursements. *Held* error.

(Argued January 30, 1883; decided February 9, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 22, 1882, which reversed an order of Special Term denying a motion for re-taxation of plaintiff's costs herein and the disallowance of certain items taxed as disbursements.

This action was brought by plaintiff as creditor of the Rochester Iron Manufacturing Company, a corporation organized under the General Manufacturing Act, on his own behalf and that of other creditors choosing to come in, against the stockholders of said corporation, to enforce the liability for the debt of said corporation imposed upon stockholders where the whole capital stock has not been paid in.

The facts so far as material are stated in the opinion.

Edward C. James for appellant. Plaintiff was entitled to include in his taxable disbursements the fees of the county treasurer. (Code of Civ. Pro., §§ 3256, 1795, 745, 3321; Laws of 1877, chap. 436, § 5, p. 494; *Matter of R. R. Co.*, 7 Abb. N. C. 403; *Beckwith v. Carroll*, 56 Ala. 12; *Hutchinson v. Hampton*, 1 Mont. 39.) Although the request to print the papers was verbal the expense was properly included in the bill of costs. (*Jewett v. Albany City B'k*, Clark, 241; *Banks v. Am. Tract Society*, 4 Sandf. Ch. 438; *Staples v. Parker*, 41 Barb. 648; *Ballou v. Parsons*, 55 N. Y. 673; *Livingstone v. Gidney*, 25 How. Pr. 1; *Corning v. Cooper*, 7 Paige, 787; 52 N. Y. 261.)

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George F. Yeoman for respondents. It was not necessary to order a retaxation. The disallowance had the "effect of a new taxation." (Code of Civ. Pro., § 3265.) The disallowance of \$1,398, for county treasurer's fees, was right. They were not a disbursement in the action. (Code of Civ. Pro., §§ 3256, 3321.)

RAPALLO, J. There is very little but a matter of form involved in this appeal. The county treasurer, by the judgment, which, for the purposes of the motion, must be assumed to be the law of this case, is authorized to docket judgments against all the stockholders, for the maximum amount of their possible liability, and to collect thereon, by execution against each defendant separately, enough to satisfy the claims of the creditors and their costs. He is also authorized out of his payments to retain his lawful commissions. Consequently, in issuing his executions, he would be entitled, for the purpose of providing enough to pay the creditors, to include therein the commissions thus authorized to be retained. The judgments he was authorized to docket were for nearly double the sum of \$133,475.22, found due to creditors. He was authorized to collect by execution, not any specific sum, but enough to pay the creditors, with costs and interest. His legal commissions were, therefore, a proper addition to be made to the execution to be issued in each case.

The plaintiff had no right to include these commissions in his bill of costs. They depended on the amount the county treasurer might collect, and they belonged to him, to be taken out of the money which might come into his hands. There is no more propriety in including these commissions in the plaintiff's bill of costs than there would be in embracing therein the poundage of the sheriff on the anticipated execution.

It cannot be that the judgment contemplated the taxation of this item of commissions by the plaintiff as costs, for it required the treasurer, after retaining his own commissions out of his collections, to pay the taxed costs of the action, and of the

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creditors who had proved their claims, and then to divide the residue among the creditors. It is clear the commissions were not intended to be included in the bill of costs of the plaintiff's attorney. We think, therefore, that the court at General Term decided correctly in excluding these commissions from the plaintiff's bill of costs. We feel constrained also to sustain the decision of the General Term as to the items of disbursements for printing the referee's report, opinion, the interlocutory and final judgment, disallowed by them. This printing, it was claimed, was requested by the attorneys for some of the defendants, and directed by the referee. Such items are taxable only when required by a rule of the court. (Code, § 3256.)

The order of the General Term should be affirmed, with one bill of costs to respondents.

All concur, except DANFORTH, J., taking no part.

Order affirmed.

MICHAEL HESSBERG, Appellant, v. THOMAS M. RILEY, Sheriff,
etc., Respondent.

Under the provision of the Code of Civil Procedure (§ 1421), providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon.

Upon motion for such substitution the plaintiff may not be heard to object that notice of the motion was not served upon the officer who made the levy, as he does not represent that officer.

It seems that the motion being made for the benefit of the officer it is to be presumed that he has notice; and, when he does not object, that he assents to the proceeding.

The effect of said provision is to make the obligors, when substituted, liable in place of the officer and the cause of action is thereupon against them. The legislature has power to make such provision.

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The said provision includes the liability of the officer for acts incidental to the levy and forming part of the transaction — for instance, the ejecting of the plaintiff from, and keeping him out of, the premises wherein the property was when levied upon.

The amount claimed in such an action was \$3,000; the undertaking was for \$1,000. *Held*, that it was a matter in the discretion of the court below whether to require additional security and that the difference did not authorize a refusal of a motion to substitute the sureties.

(Submitted January 30, 1888; decided February 9, 1888.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 8, 1882, which affirmed an order of Special Term, substituting Gustave White, Udolph White and Leopold Kleim as defendants in this action.

The nature of the action and the material facts are stated in the opinion.

John H. Clayton for appellant. The motion papers do not disclose facts authorizing the order of substitution. (Code of Civil Pro., §§ 1421, 1422; 3 R. S. [5th ed.] 54, § 43.) The bondsmen will only be held to the strict letter of their undertaking. (*Palmer v. Foley*, 71 N. Y. 109.)

Rudolph Sampter for respondent. Plaintiff could elect to sue the sheriff alone, or jointly with the indemnitors, or the indemnitors alone, on the theory that they are joint *tort feorsors* with the sheriff. (*Herring v. Hoppock*, 15 N. Y. 409; *Weber v. Ferris*, 37 How. Pr. 102.)

MILLER, J. This action was brought against defendant, the sheriff of Kings county, for entering plaintiff's store and wrongfully taking away and converting certain personal property, and also for closing said store, interrupting plaintiff's business and injuring his credit, and damages are claimed in the sum of \$2,000. The property in question was levied upon by the sheriff under an attachment issued in favor of Gustave White and Simon Oberfelder, against one Emanuel Reichert; and thereupon a bond was executed on behalf of the plaintiffs in the at-

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tachment suit, to indemnify the sheriff against any loss he might sustain by reason of the levy under said attachment, which bond was in the sum of \$1,000. The indemnitors on said bond made a motion to be substituted in the place and stead of the sheriff, under section 1421 of the Code of Civil Procedure, which motion was granted, and on appeal the General Term affirmed the order and the plaintiff herein appeals to this court.

The provision of the Code referred to is as follows: "Where an action to recover a chattel, hereafter levied upon by virtue of an execution, or a warrant of attachment, or to recover damages by reason of a levy upon, detention, or sale of personal property, hereafter made by virtue of an execution, or a warrant of attachment, is brought against an officer or against a person who acted by his command, or in his aid, if a bond or written undertaking, indemnifying the officer against the levy or other act, was given, in behalf of the judgment creditor, or the plaintiff in the warrant, before the action was commenced, the person or persons who gave it, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicants, as defendants in the action, in place of the officer or of the person so acting by his command or his aid." The appellant claims the proceedings were defective on various grounds, which we will consider. It is insisted that the section of the Code referred to requires that the undertaking should be given before the levy. There is nothing in the section cited that requires this specifically, and it would seem to be sufficient if the bond was executed before the action was commenced. The affidavit of the attorney for the plaintiffs in the attachment suit shows that the bond was given upon a claim being made by the plaintiff in this action, to the property levied upon, and we think this was sufficient to cover the sheriff's seizure, as the bond was given specially to indemnify him against loss by reason of such act.

The objection that notice of the motion was not given to the sheriff personally is not available to the appellant. He does not represent the sheriff and has no right to object that notice

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was not served on him. The motion being made for the benefit of the sheriff the presumption is he has knowledge and notice of the fact, and as he does not object, that he assents and approves of the proceeding. We see no objections to the forms of the acknowledgments to the consents of the petitioners, and we think they are in compliance with section 1422 of the Code.

We think it cannot be maintained there is no cause of action against the signers of the bond, because they have become the bondsmen of the sheriff and seek to be substituted in his place by this motion. The section of the Code referred to makes them liable as parties when substituted in his place. There is no question, as to the power of the legislature to make such a provision.

There is no force in the position that the provision of the Code does not include the act of the sheriff, which is complained of, in ejecting the plaintiff from the premises in question and keeping him out of the same. The levy made by the sheriff includes the consequences which follow it. There was but a single act of the sheriff in levying upon the goods, and results which followed it were a part of that act, and hence it was but one transaction.

It is also insisted that the indemnitors are only bound in the sum of \$1,000, while the action is to recover the sum of \$2,000; and hence the bond is insufficient, and they should be compelled to furnish additional security. This was a matter in the discretion of the court below, and as it has failed to require additional security, the presumption is it was not deemed essential. It may be added that it does not distinctly appear that the sum named in the bond was stated so specifically as to be entirely controlling.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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MARY J. ADAMS, Respondent, v. ARTEMUS L. ADAMS,
Appellant.

Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note, *held*, that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy.

(Argued December 14, 1882; decided February 9, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 14, 1881, which reversed a judgment in favor of defendant, entered on decision of the court on trial without a jury. (Reported below, 24 Hun, 401.)

This action was brought upon a promissory note dated 29th January, 1866, for \$1,000, executed and delivered by the defendant to Job Gardner, and by the latter transferred to the plaintiff.

The note was made under the following circumstances: The parties to this action intermarried in February, 1863, and lived together as husband and wife until April, 1865, when the plaintiff left the defendant and commenced an action against him for divorce on the ground of his adultery. The defendant answered, denying the alleged adultery, and issues were settled to be tried. In October, 1865, a witness, who was examined conditionally before a referee, testified to acts of adultery committed by the defendant as charged in the complaint. On the 29th of January, 1866, that action was discontinued, and the subject-matter thereof settled without costs to either party, both parties and the attorneys for the plaintiff therein signing a stipulation to that effect. On the trial of this action, the court found that the discontinuance was in pursuance of an agreement between the parties, that in consideration of defendant's giving a note for \$1,000 for plaintiff's benefit to Gardner,

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who was her father, the suit should be so discontinued, and that in pursuance of the agreement the note in suit was given.

Frederick Lansing for appellant. The parties had no legal capacity at common law to make the contract of which the note in suit formed a part. (1 Blackst. Com. 442; *Beach v. Beach*, 2 Hill, 260; *Marshall v. Rutan*, 8 Term R. 545; 2 B. & C. 291; *Loomis v. Buck*, 56 N. Y. 465; *Loose v. Ellis*, 13 Hun, 635; *Perkins v. Perkins*, 6 Q. B. 531; *Winans v. Peebles*, 32 N. Y. 423; *Van Order v. Van Order*, 8 Hun, 315.) There is no consideration for the note in suit. (Schouler on Husband and Wife, §§ 110-111; *Marshall v. Rutan*, 8 Term R. 545; 2 B. & C. 291; *Whittaker v. Whittaker*, 52 N. Y. 368; *Turney v. Turney*, 4 Edw. Ch. 566; *Anonymous*, 5 Robt. 611; *Kelly v. Case*, 18 Hun, 472.) A recovery upon it would be against public policy. (*Van Order v. Van Order*, 8 Hun, 315; *Copeland v. Boaz*, 9 Baxter, 223; *Carson v. Murray*, 3 Paige, 483; *Florentine v. Wilson*, H. & D. Sup. 303; *Gould v. Gould*, 29 How. Pr. 458.)

Levi H. Brown for respondent. The note in suit was given for a good consideration and could be enforced by the plaintiff. (*Shepherd v. Shepherd*, 7 Johns. Ch. 57; *Hunt v. Johnson*, 44 N. Y. 57; *Neufville v. Thompson*, 3 Edw. Ch. 92; *Garlick v. Garlick*, 3 Paige, 440; *Foster v. Foster*, 5 Hun, 557; *Doty v. Baker*, 11 id. 222; *Brooks v. Weaver*, 3 Alb. L. J. 283; *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212, 216; *Kelly v. Campbell*, 1 Keyes, 29; *Savage v. O'Neil*, 44 N. Y. 298; *Ridout v. Lewis*, 1 Atk. 270; *Simmons v. McElwain*, 26 Barb. 419; *Lowrey v. Smith*, 9 Hun, 514; *Reed v. Reed*, 52 N. Y. 651; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Gardner v. Gardner*, 22 Wend. 526; 10 Ves. 146-149; *Anderson v. Anderson*, 1 Edw. Ch. 380; *Calkins v. Long*, 22 Barb. 97-100, note, 105-110; *Head v. Head*, 3 Atk. 547; *Wallingford v. Allen*, 10 Pet. 583-594; *Collins v. Collins*, 80 N. Y. 12; 2 R. S. 144, § 39; Code of Pro., § 114; Code of Civil Pro., § 450; *Kirly v. Kirly*, 1 Paige, 565; *Rogers v. Rogers*,

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4 id. 516-518.) When transferred and delivered by the payee to the plaintiff it became her separate property. (*Armitage v. Pulver*, 37 N. Y. 494; Code of Pro., § 275; Code of Civil Pro., § 1207; 54 N. Y. 437-441; Code of Pro., §§ 144, 450; *Adams v. Curtis*, 4 Lans. 164; *Minier v. Minier*, id. 421; *Perkins v. Perkins*, 7 id. 10; *Howland v. Howland*, 20 Hun, 472; *Whitney v. Whitney*, 49 Barb. 319; *Moore v. Moore*, 47 N. Y. 467; *Wright v. Wright*, 54 id. 437; *Wood v. Wood*, 83 id. 575; 18 Hun, 350.) Inadequacy of consideration alone, in absence of fraud or warranty, constitutes no defense, the burden was on defendant to show an entire want of consideration in order to avail of such defense, and this he failed to do. (*Worth v. Case*, 42 N. Y. 362-370; 2 Hill, 606; *Giddings v. Giddings*, 51 Vt. 227-236; *Earl v. Peck*, 64 N. Y. 596-599; *Calkins v. Long*, 22 Barb. 101; Story on Prom. Notes, § 50; *Jerome v. Whitney*, 7 Johns. 321; *Jackson v. Alexander*, 3 id. 584-493; 45 Vt. 487; 44 id. 410; 39 id. 315.) There was amply sufficient and valuable consideration for the giving the note. (*Sykes v. Halsted*, 1 Sandf. 483; 2 Bishop on Marriage and Divorce [5th ed.], § 401, notes 1, 2; id., §§ 568-571, and notes; 5 B. & C. 375; *Collins v. Collins*, 80 N. Y. 1-12; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Burr v. Burr*, 7 Hill, 207-212; 80 N. Y. 11, 12; *Blake v. Bryant*, 55 id. 649; 12 Wend. 381; 3 Hill, 504; 59 N. Y. 390-395; 72 id. 169; 28 id. 389-394; *Wilson v. Wilson*, 1 H. of L. 538; *S. C.*, 5 id. 40; *Hobbs v. Halt*, 1 Cox's Ch. Cases, 445; *Phillips v. Myers*, 82 Ill. 67; 25 Am. Rep. 295.)

RAPALLO, J. On the trial the defendant waived all the defenses set up in his answer, except that of want of consideration for the note in suit, and that the contract of which it was a part was against public policy, and void. Consequently no other points are before us on this appeal.

We think the consideration for the note was ample. The plaintiff had instituted an action against the defendant for divorce *a vinculo*, on the ground of adultery, and had examined one witness conditionally, who had testified to the

acts charged. She was in a condition to apply to the court for alimony and counsel fees, and had she prosecuted her action to its termination, might have compelled the payment of permanent alimony, and the costs and expenses of the action. In consideration of the giving of this note, she discontinued this action, and furnished to the defendant a stipulation, signed by herself and her attorneys, by which they stipulated that it be discontinued, without costs. She also condoned the adultery charged, and returned to live with the defendant. By this arrangement the defendant not only got rid of the pending action, and the payment of costs and counsel fees therein, and of temporary alimony, but by the condonation the plaintiff precluded herself from bringing a new action, founded upon the adultery of which she had given proof. These were substantial benefits to the defendant, abundantly sufficient to support the note which he gave to her father, for her use.

We are unable to perceive on what ground the arrangement can be regarded as against public policy. It tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other.

It is objected by the appellant that the settlement was not a good consideration, because it was not final, and the case of *Kirby v. Kirby* (1 Paige, 565) is referred to, in which it was held that a settlement of a divorce suit might be made between husband and wife, but that such a settlement was subject to the supervision of the court. It is enough to say that the settlement between the present parties has stood, and the defendant has received the benefit of it. No application appears ever to have been made to set it aside, nor is any

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thing unfair or fraudulent alleged, which should call for the interposition of the court to disturb it.

The order of the General Term should be affirmed, and judgment absolute rendered against the appellant on his stipulation.

All concur.

Order affirmed and judgment accordingly.

THE PEOPLE, ex rel. THE HARTFORD LIFE AND ANNUITY INSURANCE COMPANY, Appellant, v. CHARLES G. FAIRMAN, Respondent.

Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, this is equivalent to a demurrer, and he cannot complain if the court pass upon the motion instead of ordering an alternative writ.

After a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here.

(Argued November 23, 1882; decided March 6, 1883.)

APPEAL by the relator from an order of the General Term of the Supreme Court, in the third judicial department, made September 23, 1882, which affirmed two orders of Special Term, one of which denied the motion of the relator herein for a peremptory *mandamus*, and the other denied relator's motion to modify or amend the first order so as to permit an alternative writ to issue.

Ludlow Fowler for appellant. If there was, on the hearing of the original motion for a peremptory *mandamus*, any disputed issue of a material or principal fact, it was error to deny

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the motion, the court should have directed an alternative *mandamus* so as to try such issue of fact. (Tapping's *Mandamus*, 6, 285-303; 3 Blackst. Com. 111; Preface to Wycke's N. Y. Pr. [ed. 1794]; Graham's *Juris*. 310; Monell's Pr. [2d ed.] 226; *People, ex rel. Bullard, v. Contracting Board*, 20 How. Pr. 206; preliminary note to article 4, title 2, chap. 16, Throop's Code Civil Pro.; Tapping's *Mandamus*, 303; Graham's *Juris*. 311; 2 Crary's N. Y. Pr. 64; *People, ex rel. Mott, v. Sup'rs of Greene Co.*, 64 N. Y. 600; *People, ex rel. Wasson, v. Schuyler*, 69 id. 247; *People, ex rel. Cagger, v. Sup'rs*, 2 Abb. Pr. [N. S.] 82, 83; *Ex parte Jennings*, 6 Cow. 518; *Barnet v. College of Physicians*, 7 How. Pr. 293; *Com. B'k v. Canal Com'rs*, 10 Wend. 30-31; *People, ex rel. Cagger, v. Sup'rs of Schuyler*, 2 Abb. Pr. [N. S.] 82; *People, ex rel. Mott, v. Sup'rs of Greene Co.*, 64 N. Y. 600; *People, ex rel. Wasson, v. Schuyler*, 69 id. 247; *People, ex rel. Henry, v. Nostrand*, 46 id. 375.) By proceeding to a final determination of the relator's ultimate right on a contested motion, without directing an alternative writ to issue, the court below virtually and in conformity to the long-established practice on like motions, must have decided that there were no principal issues of fact to be first determined, and that relators' right, in the first instance, depended solely on matters of law. (Tapping's *Mandamus*, 303; *People, ex rel. Cagger, v. Sup'rs*, 2 Abb. [N. S.] 82; *People, etc., v. Brennan*, 39 Barb. 522-539; *People, etc., v. Green*, 3 Hun, 208; *People, ex rel. Mott, v. Sup'rs of Greene Co.*, 64 N. Y. 600; Code of Civil Pro., § 2070.) Because the relator moved the peremptory writ, it did not thereby abandon the right, by the practice indicated, to have the alternative writ awarded. (*People v. Sup'dt*, 73 N. Y. 173.) The appellate courts review applications of this sort freely, both on the ground of error of law and of errors in the exercise of the discretion in the court below. (*People, ex rel. Wasson, v. Schuyler*, 69 N. Y. 242.)

R. W. Peckham for respondent. The denial of the motion in this proceeding, made by the relator, after the denial of its motion for a peremptory writ, was proper. (*People, etc., v.*

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Sup'rs, 73 N. Y. 173.) The original order refusing the *mandamus* was right. (*Paul v. Virginia*, 8 Wall. 168; *Doyle v. Confl F. Ins. Co.*, 94 U. S. 535.)

RAPALLO, J. The reasons assigned in the opinion of the court at Special Term, for denying the peremptory writ of *mandamus* there applied for, were in our judgment quite sufficient to justify the conclusion reached.

The relator cannot now complain that the court passed upon the motion for a peremptory writ, instead of awarding an alternative writ. The motion was for a peremptory writ, and it does not appear that any application was made for an alternative writ, but on the contrary, that after the respondent had read affidavits in justification of his own action, and controverting the allegations of the relator, the latter, without introducing any further papers, proceeded to argue and submit his motion for a peremptory writ, on the papers then before the court, in the face of the rule declared in *People v. Supervisors* (73 N. Y. 173), that such a course is equivalent to a demurrer to the facts set up by the respondent.

The order denying the motion for a peremptory writ should consequently be affirmed.

After the decision of that motion, the relator made a further motion to modify the order thereon, so as to permit an alternative writ to issue. This last motion was addressed to the discretion of the court, and its decision thereon is not reviewable here.

The appeal from this last order should be dismissed, with costs of one appeal.

All concur.

Ordered accordingly.

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GEORGE YOUNG, Respondent, v. HORACE K. THURBER et al.,
Appellants.

H., who was the consignee and agent of a manufacturing corporation for the sale of its manufactures, under an agreement by which he was to make advances to the company on goods consigned, and reimburse himself out of proceeds of sales, sold certain of the goods to defendant in his own name, upon which he had made advances to more than their value. In an action to recover the purchase-price, defendants sought to set off an account against the company, which had become insolvent, for goods sold by them to it. *Held*, that defendants were not entitled to the set-off. After defendants had sold to the corporation a portion of the goods for which the set-off was claimed they requested H. to consent that the purchases of the company be charged to his account; this he refused, but stated that when defendants' account should fall due, he would accept the company's draft for the amount. *Held*, that this could not be construed as an agreement to allow the set-off; that it was simply a voluntary promise to accept, and if enforceable on the ground that goods were delivered on the faith of it, could be enforced only according to its terms, and as defendants never obtained or attempted to obtain such a draft, defendants had acquired no rights under it.

(Argued December 18, 1882; decided March 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made the first Tuesday of May, 1881, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and granted a new trial.

The nature of the action and the material facts are stated in the opinion.

E. Countryman for appellants. By his agreement with the corporation Hermance was clearly constituted at least the general agent of the glass works, for the sale of its manufactures, and his sales of goods to the defendants were the sales of the corporation. (*Jeffrey v. Bigelow*, 13 Wend. 518, 522; *Anderson v. Coonley*, 21 id. 279; *Ferguson v. Hamilton*, 35 Barb. 427, 441, 442; *Story on Agency*, §§ 17-19.) It is not material whether the sales of the agent were made in his own

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name or in the name of the company. In either event, and whether the principal was known or unknown to the purchasers, the corporation was responsible for and could enforce the sales made by its authorized agent. (*Nicoll v. Burke*, 78 N. Y. 580; *Hill v. Miller*, 76 id. 33; *Beardsley v. Duntley*, 69 id. 577; *Briggs v. Partridge*, 64 id. 358, 362; *Indianapolis, etc., R. R. Co. v. Tyng*, 63 id. 655; *Coleman v. First Nat. Bk.*, 53 id. 388.) The agent also had authority to sell on credit. (*Leland v. Douglas*, 1 Wend. 490; *Van Allen v. Vanderpoel*, 6 Johns. 69; Story on Agency, § 60; 1 Chitty on Contracts [11th Am. ed.], 295.) Plaintiff's position, therefore, is no better than that of Hermance. (*Barlow v. Myers*, 64 N. Y. 41; *Davidson v. Alfero*, 16 Hun, 353; *S. C.*, 80 N. Y. 660.) The fact that defendants charged their sales to Hermance does not conclude them. (*Swift v. Pierce*, 13 Allen, 136, 137; *Gardiner v. Hopkins*, 5 Wend. 23, 24; *Walker v. Richards*, 41 N. H. 388; *Hogan v. Bearden*, 36 Tenn. 48; *Champion v. Doty*, 31 Wis. 190.) Equity requires that cross-demands be set off against each other if, from the nature of the claim, or the situation of the parties, justice cannot otherwise be done. (*Smith v. Felton*, 43 N. Y. 419, 422, 423; *Lindsay v. Jackson*, 2 Paige, 581; *Smith v. Fox*, 48 N. Y. 674; *Davidson v. Alfarod*, 16 Hun, 353; *S. C.*, 80 N. Y. 660.) By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to such debt, as a means of discharging it. (2 Story's Eq. Jur., § 1435; *Ex parte Prescott*, 1 Atk. 230; *Hankey v. Smith*, 3 D. & F. 507, note.) A court of law could not formerly set off independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what is called a natural equity. (2 Story's Eq. Jur., §§ 1435, 1436; *Uphon v. Wyman*, 7 Allen, 499; *Schiefflin v. Hawkins*, 1 Daly, 289; *Receiver v. Paterson Ins. Co.*, 23 N. J. Law, 283.) A joint debt may in equity (contrary to the rule at law) be set off against a separate debt, where

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there is a clear series of transactions establishing that there was a joint credit given on account of the separate debts, or under any special circumstances that may occur creating an equity. (2 Story's Eq. Jur., §§ 1437, 1437b; *Simpson v. Hart*, 14 Johns. 64; *Spurr v. Snyder*, 35 Conn. 172; *Blake v. Langdon*, 19 Vern. 485; *Vulliomy v. Noble*, 3 Merivale, 593; *Marshall v. Cooper*, 43 Ind. 47; *Jeffries v. Evans*, 6 B. Monr. [Ky.] 119; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Barber v. Spencer*, 11 Paige, 517.)

Charles A. Fowler for respondent.

RAPALLO, J. The plaintiff, as assignee of Jacob Hermance, brought this action to recover of the defendants the price of certain glassware sold to them by Hermance. The defendants claim to set off against the plaintiff's demand an indebtedness of an incorporated company known as the Ellenville Glass Works, to the defendants, for goods sold by them to that company. The grounds upon which the defendants claimed this set off were that Hermance was the consignee and sole agent of the Ellenville glass works, for the sale of its wares, and that the goods sold to the defendants by him, were sold as such agent and consignee; that the company had become insolvent, and that under the circumstances the defendants should in equity be allowed to set off their claim for goods sold to the company, against the bill of goods sold to them by Hermance as the agent of the company.

They further claimed that after a part of the goods sold by them to the company had been delivered, and when the company applied to make further purchases, Hermance agreed with them that their sales to the company should be credited upon his bill against them.

The facts proved and found do not sustain these claims. It is established by the evidence and findings, that Hermance was the consignee and agent of the company for the sale of its wares, but it also appears that he became such agent and consignee under an arrangement by which he was to make ad-

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vances to the company on the goods consigned to him, and to reimburse himself these advances out of the proceeds of the sales. That under this arrangement he made advances exceeding the value of the goods consigned, and sold the goods in his own name. He was consequently not simply the agent of the company, but he had an interest of his own in the proceeds of the sales, and there would be no equity in allowing his vendees to retain out of the proceeds of the goods thus consigned to and sold by him, and upon which he had a right to rely for the reimbursement of his advances, independent claims which his vendees might have against his consignors.

The allegation that Hermance agreed that the purchases of the company might be credited to the defendants on his account against them is not sustained. The evidence in support of this allegation consists wholly of written correspondence between the parties, which is set forth in the findings of the referee. From the correspondence it appears in substance that after the defendants had sold to the company a portion of the goods for which an offset is now claimed, they wrote to Hermance, requesting his consent that the purchases of the company be charged to his account, and that he refused such consent, but at the same time stated that when the defendants' account should fall due, he would accept the company's draft for it. This promise the referee, before whom this action was tried, construed as an agreement that the goods sold by the defendants to the company should be set off against the purchases made by the defendants from Hermance, and consequently allowed the set off. The court at General Term reversed this decision, and we think correctly. Hermance was under no obligation to allow the claims of the defendants against the company to be set off against his sales to the defendants, upon the proceeds of which he had a lien, and his promise to accept the company's drafts appears to have been entirely voluntary. If enforceable on the ground that goods were delivered on the faith of it, the promise could be enforced only according to its terms, and it is found as a fact that the defendants never obtained, or attempted to obtain, the order

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of the company on Hermance for the bills of goods sold by them to the company.

These reasons, we think, are sufficient to require us to affirm the order of the General Term, and it follows that judgment absolute should be rendered against the appellants upon their stipulation.

All concur.

Order affirmed and judgment accordingly.

PETER J. VANDERBILT, Appellant, v. JOHN SCHREYER, Impleaded, etc., Respondent.

A provision in the assignment of a bond and mortgage, guaranteeing its payment "by due foreclosure and sale," is not an absolute guaranty of payment, but is a conditional undertaking to pay any deficiency arising on foreclosure and sale.

Such a guarantor, although conditionally liable only, was prior to the adoption of the Code of Civil Procedure, by force of the Statute (2 R. S. 191, §§ 153, 154) properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency is proper.

In an action to foreclose a mortgage so assigned, wherein S., the assignor and guarantor, was sought to be charged with a deficiency, he answered, alleging in substance that plaintiff contracted with G. and M. to erect for them certain buildings and receive in payment for the first installment due under the contract, an assignment from S. of the bond and mortgage in question; that plaintiff commenced performance, and when he became entitled to the first payment S. offered to assign, but plaintiff refused to accept or to go on with the work unless the guaranty was made; that S., believing he was acting under compulsion, thereupon executed the assignment and guaranty in question, and that "no consideration ever passed to him (S.) or his principal, for such guaranty." S. offered to prove these allegations on the trial, but the same were excluded. *Held* error; that the facts alleged showed the guaranty to have been given without consideration; that the assignment itself was not conclusive on this point and might be disproved; that plaintiff had no right to demand the guaranty under his contract, and the incorporation of the guaranty into the assignment, for which there was a consideration, did not affect the question, as the guaranty was, so far as its legal effect was concerned, a separate instrument, which must be supported upon a sufficient con-

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sideration, or treated as *nudum pactum*; and that, therefore, the answer set up a good defense.

Vanderbilt v. Schreyer (21 Hun, 537), reversed.

(Argued January 23, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 1, 1880, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at a Special Term and dismissed the complaint. (Reported below, 21 Hun, 537.)

The nature of the action and the material facts are stated in the opinion.

T. M. Tyng for appellant. The defendant, John Schreyer, was properly made a defendant in the present action, and was chargeable with any deficiency; and this, whether his guaranty was of "payment" or "collection." (Code of Civil Procedure, § 1627; *Scofield v. Doscher*, 72 N. Y. 491; 85 id. 226; 84 id. 105.) The assignment being an instrument under seal full consideration may be presumed, and the onus lay upon the defendant to show the absence of consideration. (*Home Ins. Co. v. Watson*, 59 N. Y. 390.) There was an abundant consideration for the guaranty. (*Home Ins. Co. v. Watson*, 59 N. Y. 390.)

John L. Lindsay for respondent. If the original debt or obligation is already incurred or undertaken previous to the collateral undertaking, then there must be a new and distinct consideration to sustain the guaranty. (2 Parsons on Contracts [5th ed.], 7; *Tinker v. Geraghty*, 1 E. D. Smith, 687; *Geer v. Archer*, 2 Barb. 420; *Homan v. Liswell*, 6 Cow. 659; *Gottsberger v. Rodway*, 2 Hilt. 342; *Farnsworth v. Clark*, 44 Barb. 601; *Van Allen v. Jones*, 10 Bosw. 369; *Halliday v. Hart*, 30 N. Y. 474; *Scott v. Hart*, 2 How. 58; 17 Johns. 169; *Sands v. Hill*, 42 Barb. 651; *Reband v. De Wolf*, 1 Paine's C. C. 580; *Elder v. Warfield*, 7

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Harr. & J. 391; *Ware v. Adams*, 24 Me. 177; *Parker v. Barker*, 2 Metc. 423; *Anderson v. Davis*, 9 Vt. 136; *Blake v. Parlin*, 22 Me. 395; *Bell v. Welch*, 9 C. B. 154; *Minturn v. Seymour*, 4 Johns. Ch. 497.) Until after foreclosure and sale no action could lie against Schreyer. (*Moakly v. Riggs*, 19 Johns. 69; *Sawyer v. Haskell*, 18 How. Pr. 282; *Taylor v. Bullew*, 6 Cow. 624; *Thomas v. Woods*, 4 id. 173; *Crumpton v. McNair*, 1 Wend. 457; *White v. Case*, 13 id. 543; *Curtis v. Smadman*, 14 id. 231; *Eddy v. Stanton*, 21 id. 255; *Loveland v. Shepherd*, 2 Hill, 139; *Burt v. Homer*, 5 Barb. 501; 6 id. 547; *Mosher v. Hotchkiss*, 3 Keyes, 161; *Craig v. Parkes*, 40 N. Y. 181.) If the contract described be absolute, but the contract proved be conditional, or in the alternative, it is fatal. (1 Greenleaf on Evidence [Redf. ed.], 71, § 58.) The point that the original answer "admits that he guaranteed payment thereof" is not well taken. (*Jurvis v. Sewell*, 40 Barb. 449; *Burt v. Place*, 4 Wend. 591; *Ritchie v. Putnam*, 13 id. 524; *Dresser v. Brooks*, 3 Barb. 429.)

RUGER, Ch. J. This was an action to foreclose a mortgage for \$5,000 given September 5, 1873, by one James Dunseith and wife to John Schreyer, and by him assigned to the plaintiff on the 5th day of May, 1874.

Schreyer was made a party defendant, and it was sought to charge him with the payment of any deficiency that might arise upon a sale of the mortgaged premises, upon the ground that he had guaranteed the payment of the mortgage debt.

Schreyer answered, and after admitting the assignment and the guaranty of payment alleged by way of defense, that on the 2d day of February, 1874, the plaintiff entered into a contract with George Gebhard and Matthew L. Ritchie for the erection by him of certain buildings for them upon certain lots in the city of New York, for which he was to receive \$8,175, to be paid as follows: "When the said houses are topped out, a payment of \$5,000 by assignment of a bond and mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West Forty-second street, New York

city," and the balance, amounting to \$3,175, when the houses should be fully completed. Vanderbilt commenced performance of his contract and continued until he became entitled to the assignment of the \$5,000 mortgage. Schreyer thereupon offered to assign it to the plaintiff, but the latter refused to accept an assignment unless Schreyer would also guarantee payment. The defendant refused to do this, and Vanderbilt then suspended work upon the buildings for about two months. The defendant then under protest, and believing as he alleges that he was acting under compulsion, executed the assignment with the guaranty in question. The plaintiff then completed his contract and received the balance of the consideration. The answer further states "that it was neither under said contract or otherwise made a condition of the plaintiff's accepting the assignment of said mortgage that this defendant or any other person should guarantee the payment thereof," and further "that no consideration ever passed to him or his principals for such guaranty and the same was and is null and void."

Upon the trial of the action at Special Term the plaintiff produced and proved the mortgage in question, and also an assignment from defendant to plaintiff in the usual form, but containing the following clause: "And I hereby guarantee the payment of said bond and mortgage for \$5,000 and interest from May 5, 1874, by due foreclosure and sale." The assignment and guaranty were sealed and executed in the presence of a subscribing witness. The plaintiff thereupon rested, and the defendant offered to prove in substance the facts alleged in his answer, which offer was objected to and excluded upon the ground that such answer did not set up facts constituting a defense. The defendant excepted to such ruling. The court thereupon held that said guaranty was absolute and ordered judgment against Schreyer for the deficiency which had previously been ascertained by a sale of the premises. An appeal was taken to the General Term, which reversed the judgment and directed a dismissal of the complaint upon the ground that Schreyer was improperly made a defendant, because the guaranty in question was in effect a guaranty

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of collection only, and that no right of action arose thereon until after the amount of the deficiency had been ascertained by a judicial sale of the mortgaged premises.

We differ in our conclusion from that reached by both of the courts below.

The guaranty in question is not an absolute guaranty for the payment of the mortgage, but a guaranty that it shall be paid in a particular manner. In construing it we must give effect not only to the entire instrument but also to all of its language. This requires us to give some effect to the words, "by due foreclosure and sale," and they can perform no other office in the connection in which they are used than to qualify and limit the operation of the preceding words, "I hereby guarantee the payment of said bond and mortgage." We must conclude that the parties put these words into their contract for some purpose; and the only purpose they can be made to serve is to make the guaranty a conditional instead of an absolute one. A covenant quite similar to this was held in the case of *Mahaiwe Bank v. Culver* (30 N. Y. 313), to be a covenant to pay any deficiency existing after a foreclosure and sale.

But we suppose it to be immaterial whether this guaranty be called a guaranty of payment or of collection, for in either event the plaintiff was entitled to make Schreyer a party defendant in the foreclosure action and demand and recover a judgment against him therein for any deficiency which might arise on a sale of the mortgaged premises.

The principles applicable to the prosecution of actions against guarantors of the collection of promissory notes and other securities do not apply to actions for the foreclosure of mortgages. In the latter the persons who may be made parties therein are pointed out by statute, and include all who are under obligation to pay the mortgage debt, or any part thereof, whether such obligation be absolute or conditional.

This action was commenced, and tried, prior to the adoption of section 1627 of the Code of Civil Procedure. It must, therefore, be governed by the provisions of the

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Revised Statutes. The sections applicable are the following: 2 R. S. (1st ed.), 191, § 154, reads: "If the mortgage debt be secured by the obligation or other evidence of debt hereafter executed, of any other person beside the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases." Section 153, same statute, reads: "After such bill (bill for foreclosure) shall be filed while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof unless authorized by the Court of Chancery."

These provisions of the statute remained without material changes, so far as the question under discussion is concerned, until the adoption in 1880 of the last portion of the Code of Civil Procedure. The scheme of these provisions was stated by this court in the *Equitable Life Ins. Soc. v. Stevens* (63 N. Y. 341) to be to prevent oppressive litigation by the multiplication of actions against the several persons who might be liable for the same mortgage debt, and to require all of the parties interested in its payment to be brought into the same suit and thus settle their respective liabilities in one comprehensive action. Previous to the enactment of section 1627 of the Code of Civil Procedure it was the settled practice of courts of equity to bring all parties who were in any way liable for the payment of the mortgage debt, or any part thereof, and whether liable upon an absolute or conditional undertaking, into the same foreclosure action and decree payment of any deficiency arising on a sale of the mortgaged premises, against any of the parties appearing to be liable therefor, according to the nature and circumstances of such liability. The principle that such person, whether liable conditionally or absolutely, may be sued and made liable for any deficiency in an action to foreclose the mortgage is laid down in the works on chancery practice and sustained by numerous cases. (See 2 Hoffman's Ch.

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Pr. 141-2; 2 Barb. Ch. Pr. 175-6; *Leonard v. Morris*, 9 Paige, 90; *Suydam v. Bartle*, id. 294; *Curtis v. Tyler and Allen*, id. 432; *Griffith v. Robertson*, 15 Hun, 344; *Scofield v. Doscher*, 72 N. Y. 491.) Other actions of a similar nature are provided for in our statute, as in the case of proceedings in equity against insolvent corporations to reach stockholders and trustees who may be contingently liable for the payment of the debts of such corporations. These trustees and stockholders are chargeable with a conditional liability in the action brought to dissolve the corporation. Of course, where the liability of a person to pay a mortgage debt depends upon some extrinsic event which cannot be determined in the prosecution of the foreclosure suit, he could not be made a party to such an action and charged with a deficiency, because, by the terms of his contract, his liability would not commence until the happening of the event contracted for, and that might be wholly disconnected with the process of foreclosure.

Such was the case of *The Pennsylvania Coal Co. v. Blake* (85 N. Y. 226), where the party guaranteed to pay the mortgage debt, provided another party upon demand did not do so. There a demand was held necessary before suit brought. The serious consequences of neglecting to include as parties all persons liable for the payment of the mortgage debt in a foreclosure thereof are illustrated in the case of *The Equitable Life Ins. Soc. v. Stevens*, already cited. It was there held that upon an application for leave to prosecute an action at law against parties liable for the payment of the mortgage debt, the granting of the permission rested in the discretion of the court, whether the application was made during the pendency of the foreclosure suit or after it had terminated; and that in the exercise of a wise discretion the court had the power to deny such permission, even when the claim had not been prosecuted in the foreclosure suit. The order of the court below granting leave to prosecute such an action was reversed, upon the ground that it had declined to exercise its undoubted discretionary power.

That an action at law either during the pendency or after the

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termination of a foreclosure suit cannot be maintained by the holder of a mortgage against a person liable for the payment or collection of the mortgage debt, without leave of the court, duly obtained, has frequently been held in this State. (*Pattison v. Powers*, 4 Paige, 549; *Comstock v. Drohan*, 71 N. Y. 9; *Scofield v. Doscher*, *supra*.) It follows from these authorities that the plaintiff was not only justified in making Schreyer a defendant in this action, and asking judgment for a deficiency against him, even though his guaranty was one of collection merely, but that it would have been hazardous to his security if he had omitted to do so. A more serious question, however, arises under the exception taken to the rulings of the Special Term excluding the evidence offered by the defendant to prove the facts stated in his answer, showing that the guaranty was without consideration.

In considering this question the allegations in the answer must be assumed to be true, and that the defendant would have proved them if he had not been precluded by the rulings of the court from doing so. The answer, while perhaps inartificially drawn, certainly alleged all of the facts necessary to show that neither Gebhardt and Ritchie, or the plaintiff, had received any consideration for the guaranty in question. This he should have been allowed to prove. The production of the assignment in evidence, purporting to be executed "for value received," and being under seal was *prima facie* evidence only of a valuable consideration. It was not conclusive and could be disproved if it was in the defendant's power to do so. (3 R. S. (6th ed.) 672, § 124; *Bookstaver v. Jayne*, 60 N. Y. 146; *Anthony v. Harrison*, 14 Hun, 198; affirmed in this court, 74 N. Y. 613.)

The incorporation of this guaranty into the assignment for which there was a consideration does not affect the question. It was not essential to the assignment and was, so far as its legal effect was concerned, a separate instrument, and must be supported upon a sufficient consideration or treated as *nudum pactum*.

It is quite clear that the plaintiff had no right to demand

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this guaranty by the terms of his original contract with Gebhardt and Ritchie. That was satisfied by a mere naked transfer of his interest in the mortgage.

It was held in *Van Eps v. Schenectady* (12 Johns. 436), that an agreement to execute a deed of lands was satisfied by the execution of a deed, without warranty or covenants. So it has been held that a party has no right to impose any conditions to the performance of a contract, except those contained in the contract itself. (*Brown's Water Furnace Co. v. French*, 34 How. Pr. 94.) It being clear that Vanderbilt had no legal right to require, as a condition to the fulfillment of his contract, the performance of an act not required by the contract, it is difficult to see what benefit he has bestowed or what inconvenience he has suffered in return for the undertaking assumed by the defendant. He promises to do only that which he was before legally bound to perform. Even though it lay in his power to refuse to perform his contract, he could do this only upon paying the other party the damages occasioned by his non-performance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which he had upon a good consideration voluntarily entered.

There is no evidence in support of a claim that this guaranty was given as a compromise of any dispute arising with reference to the obligations of the plaintiff under his contract with Gebhardt and Ritchie. The case is not, therefore, brought within the cases in which a promise has been upheld on the theory that it was made in settlement of a controversy over disputed claims. The authorities seem quite uniformly to show the inadequacy of the consideration alleged for the guaranty in question. In *Geer v. Archer* (2 Barb. 420), the defendant visited the plaintiff to pay her an installment upon a mortgage given by him a few weeks before on a purchase of land. She complained that she had not received the fair value of her land upon such purchase. The defendant offered to give her his note for \$200 to satisfy her complaints. She replied that she would be satisfied with that, whereupon the note in question

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was given. It was held that this note was void for want of consideration. So, where land was sold and described in the deed as containing a certain quantity, and a deficiency was afterward discovered, it was held that there was no obligation on the grantor to compensate the grantee for such deficiency, and a promise to pay the same was without consideration. (*Smith v. Ware*, 13 Johns. 257; *Ehle v. Judson*, 24 Wend. 97.)

Pollock states the rule as follows: That "neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party." (Pollock on Principles of Contracts, 161; *Crosby v. Wood*, 6 N. Y. 369; *Deacon v. Gridley*, 15 C. B. 295.) "Nor is the performance of that which the party was under a previous valid, legal obligation to do a sufficient consideration for a new contract." (2 Parsons on Contracts, 437.) When certain sailors had signed articles to complete a voyage, but at an intermediate port refused to go on, and the captain thereupon promised to pay them increased wages, it was held that the promise was without consideration. (*Bartlett v. Wyman*, 14 Johns. 260.) A firm having a contract to build a railroad found the contract unprofitable, whereupon the railroad company promised if they would go on and complete the contract they would repay to the contractors all of the obligations which they had or would incur in consequence of their completion of the work. Held no consideration. (*Ayres v. The C. R. I. & P. R. Co.*, 52 Iowa, 478.)

When a mortgagor, as a condition to the payment of his mortgage, exacted from the mortgagee an obligation that he would procure the cancellation of a certain outstanding bond executed by the mortgagor, or pay him the sum of \$100, said bond being given to indemnify against some apparent incumbrance, it was held, that it not being shown that there was any incumbrance existing against the land, the obligation was without consideration. (*Conover v. Stillwell*, 34 N. J. L. 54.) When the plaintiff agreed to enter the military service of the United States to the credit of the town of Tobin for \$100, and

on arriving at the place of enlistment, being offered an advanced price by others, refused to perform unless they would pay him \$250 additional, *held*, that an obligation to pay him the additional amount was void for want of consideration. (*Reynolds v. Nugent*, 25 Ind. 328) A sailor signed articles for a voyage to Melbourne and home at three pounds per month ; several of the crew deserted at Melbourne. The captain, to induce plaintiff to remain, signed fresh articles for six pounds per month. *Held* no consideration for the promise. (*Harris v. Carter*, 3 Ellis & Blackburn, 559 ; to same effect *Stilk v. Myrick*, 2 Camp. 317.) When defendants gave plaintiff's notes to provide funds to take up obligation, which plaintiff had previously contracted to pay, *held* no consideration. (*Mallalieu v. Hodgson*, 16 Ad. & El. [N. S.] 689.) A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpoenaed, is without consideration. The attorney did nothing except what he was legally bound to do. (*Smithett v. Blythe*, 1 Barn. & Ad. 514).

It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of *Latimore v. Harsen* (14 Johns. 330).

It necessarily follows from these authorities that the plaintiff had no right to impose, as a condition to the performance of his contract, that the payment of said mortgage should be guaranteed. Although the defendant was not a party to the original contract and the consideration and contract between him, Gebhardt and Ritchie does not appear, yet we must assume that he acted at the request of Gebhardt and Ritchie, and was required only by such contract to execute such an assignment as Gebhardt and Ritchie had contracted to give. The answer at all events sets up that he received no consideration from any one for the guaranty sued upon.

The answer also alleges that the sole consideration received for this guaranty was the performance by the plaintiff of his contract with Gebhardt and Ritchie.

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We think this answer sets forth a defense to the action, and inasmuch as the defendant has been erroneously deprived of the opportunity of proving it, if in his power to do so, that a new trial should be ordered.

The judgment, therefore, of the General Term dismissing the complaint should be reversed, and its order reversing the judgment ordered against the defendant at Circuit affirmed, and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS and DANFORTH, JJ., not voting. Judgment accordingly.

WILLIAM YOUNG, Appellant, v. ANN ELIZA EDGERTON, as
Administratrix, etc., Respondent.

S. and K. entered into a contract for the sale by the former, and purchase by the latter, of certain premises, the purchase-price to be paid by installments; S. to convey, "by good and sufficient deed," when all the purchase-money was paid. K. entered into possession under the contract; S. assigned the contract for full value to E., defendant's testator; K. assented thereto, and after making a payment upon the contract to E., assigned his interest therein to H., who paid the balance and then demanded of E. a deed or re-payment of the moneys paid. The title to the land was not in fact in S. and he, when the last payment was made, was insolvent. *Held* (EARL, J., dissenting), that in the absence of any proof of fraud or bad faith, an action was not maintainable against E. to recover back the money paid; that the assignment to E. transferred no title to the land and imposed upon him no obligation; that the money he received was actually due to him, and that there could be no obligation to refund it; that plaintiff's remedy was by action against S.

Smith v. McCluskey (45 Barb. 610), so far as this point is concerned, questioned.

The referee found that at the time of payment the parties were ignorant that the title was not in S. *Held* immaterial; that the mistake did not create any obligation on the part of E.

(Submitted January 28, 1883; decided March 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 3,

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1878, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and granted a new trial. (Reported below, 16 Hun, 28.)

This action was brought originally against Apollos C. Edgerton, to recover back moneys paid upon a contract for the sale of lands. Edgerton died during the pendency of the appeal to this court, and the present defendant, his executrix, was substituted. The following facts appeared and were substantially found.

On the 2d day of February, 1867, one James R. Shaver entered into a contract with one Kilmer to sell him lots Nos. 10 and 11 in great lot No. 37 in Hardenburgh Patent, each lot consisting of one hundred and two acres of land, for the sum of \$1,500, payable in installments, with annual interest; and when the whole sum of \$1,500, with interest, should be paid, Shaver agreed to execute and deliver to Kilmer a quitclaim deed of lot No. 10, and "a good and sufficient deed" of lot No. 11. On the 1st day of March, 1867, Kilmer paid \$200, as provided in the contract, and took possession of the lands therein mentioned. At the time of making that contract, and for many years prior thereto, one Charles Knapp was the owner in fee-simple of lot No. 11. On the 24th day of June, 1859, he entered into a written contract with one Townsend Shaver, by which he agreed to sell to him that lot for \$600, payable \$100 annually. Under that contract Shaver entered into possession of the lot, but he did not pay any part of the purchase-price. On the 5th day of May, 1864, Townsend Shaver entered into a written contract with James R. Shaver, whereby he agreed to sell lot No. 11 to him for the sum of \$1,097.34, payable in installments. James R. Shaver entered into possession of the lot under that contract, and continued to occupy it until he made the above-mentioned contract with Kilmer in February, 1867. There is no evidence that James R. Shaver ever made any payments upon his contract, and he had no other title to or interest in lot No. 11 than such as was acquired by the contracts of purchase just mentioned. At the time of the contract between Townsend Sha-

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ver and James R. Shaver, Townsend was in default upon his contract with Knapp. On the 11th day of April, 1867, James R. Shaver, for a valuable consideration, sold and assigned his contract with Kilmer, by a written assignment, to said Apollos C. Edgerton, of which the following is a copy: "For value received, I hereby sell, assign, transfer and set over to A. C. Edgerton all my interest in the within contract for his own use and benefit," and at the same time he delivered the contract, with the assignment, to Edgerton, who took the assignment in good faith, and paid full value therefor. Afterward Edgerton collected from Kilmer the sum of \$200. On the 20th day of April after, Kilmer sold and assigned his interest in the contract to one Hodge for a good and valuable consideration, and authorized and empowered him to receive the deed covenanted to be given in the contract, and delivered the assignment and contract to him. Hodge thereafter paid Edgerton at different times installments in all making up the full amount due under the contract, the last payment for \$107 being made on the 10th day of June, 1874. All the payments made by Kilmer or Hodge, except the last, were made by them and received by Edgerton in ignorance of the fact that Knapp held the title to lot No. 11, and under the mutual supposition and belief that at the time James R. Shaver entered into the contract with Kilmer he had a good and perfect title to all the lands described in the contract. At the time of the last payment, both Hodge and Edgerton knew that Knapp had the title to lot No. 11. At the time of making the last payment Hodge demanded of Edgerton a deed of the premises in pursuance of the contract, which he refused to give, and Hodge then demanded back the money paid by him to Edgerton on the contract, and he refused to pay the same or any part thereof. Soon after Edgerton took the assignment of the contract from Shaver he notified Kilmer that he had the contract, and that payments must be made to him. Kilmer assented to the transfer and proceeded to make the payments; and this Hodge knew before he took the assignment from Kilmer. At the time of the assignment of the contract from Kilmer to Hodge,

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Kilmer agreed to pay Hodge \$200 and the amount that Hodge should pay, and he, Kilmer, was to continue in possession of all of the premises, which he did until some time in 1873, when he abandoned the same, and he did not pay Hodge any amount whatever. During the time he occupied the premises, however, he built a house on lot No. 11. After he abandoned the premises they were occupied by one Bryden, under Hodge, about one year, and until the spring of 1874. On the 15th day of April, 1874, Hodge entered into a written contract with Wilson and Keeler, by which he agreed to sell them both the lots Nos. 10 and 11 for the sum of \$1,700, payable in installments. Wilson and Keeler took possession under the contract, and continued to occupy and possessed them until the fall of 1874, when they agreed with Hodge to abandon the premises, and did abandon them, and they remained vacant and unoccupied until after the commencement of this action, which was the 1st of March, 1875. Soon after the above arrangement between Hodge and Wilson and Keeler, Hodge notified Edgerton that the premises had been abandoned, and offered to surrender them to him, and to cancel his contract, and again demanded a deed of the premises or the payment of the money paid by him to Edgerton on the contract, with each and all of which Edgerton refused to comply. On the 17th of December, 1874, Hodge, for a valuable consideration, sold and assigned to the plaintiff in this action the contract between James R. Shaver and Kilmer, and all causes of action, claims or demands, whether at law or in equity, against Edgerton for damages arising from the breach of the contract, the receipt of moneys, thereon or failure to execute a deed in pursuance thereof. On the 27th of January, 1875, Kilmer, for a good and valuable consideration, by written assignment, sold and assigned to the plaintiff all causes of action, claims and demands against Edgerton growing out of the receipt of the moneys thereon by Edgerton.

W. & G. W. Youmans for appellant. A contract for the sale of lands may be rescinded, and purchase-money, paid in ad-

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vance by one party, may be recovered back on the failure of the other to perform, even though the former could not have performed. But neither party can in such case recover damages for a breach of the contract. (*Bigler v. Morgan*, 77 N. Y. 312, 318; *Margraf v. Muer*, 57 id. 155-159; *Tice v. Zinsser*, 76 id. 549-562; *Corkaoff v. N. Y. & H. R. R. Co.*, 69 id. 201.) The vendee was under no obligation to pay his money to the vendor, and trust to a remedy by action for damages, in case the latter should fail to remove the incumbrances. (*Morange v. Morris*, 3 Keyes, 48; *S. C.*, 32 How. 178; *Hartley v. James*, 50 N. Y. 38; *Pumpelly v. Phelps*, 40 id. 59-67.) Defendant, taking the contract subject to the equities between the parties, stands in Shaver's place, and under the facts in this case is liable to the plaintiff for all moneys paid to him (the defendant) upon such contract. (*Curtiss v. Guild*, 57 N. Y. 229; *Blydenburgh v. Thayer*, 1 Abb. Ct. of App. Dec. 156; *Ingraham v. Disburgh*, 47 N. Y. 421; 1 Wait's Act. and Def. 366; 4 id. 483-508; 5 id. 513; *Kingston B'k v. Eltinge*, 40 N. Y. 391; *Martin v. McCormack*, 8 id. 331; *Granger v. Allcott*, 1 Lans. 164; *Gardner v. Mayo*, 26 Barb. 423; *Butler v. Livermore*, 52 id. 570-579.) The covenant in the contract from James R. Shaver to Kilmer, providing for the giving "a good and sufficient deed," calls for something more than a deed sufficient, merely, in point of form; it implies an operative conveyance sufficient to vest good title in the grantee. (*Delavan v. Duncan*, 49 N. Y. 485; *Story v. Conger* 36 id. 673; *Clute v. Robison*, 2 Johns. 595; *Judson v. Wess*, 11 id. 525; *Everson v. Kirtland*, 4 Paige, 628; Kingsley's Cowen's Treatise, § 307; 40 N. Y. 391-395; Moak's Van Santvoord's Pleadings, 380; *Fletcher v. Button*, 4 Comst. 396; *Lawrence v. Taylor*, 5 Hill, 107; *Canal B'k v. B'k of Albany*, 1 id. 287; *Waite v. Leggett*, 8 Cow. 95; *Smith v. McClusky*, 45 Barb. 610-615; *Langley v. Warner*, 3 N. Y. 327; 11 Metc. 248; *Clark v. Pinney*, 6 Cow. 297; *Stevens v. Austin*, 1 Metc. 558; *Pease v. Pettis*, 47 Barb. 276; *Kinney v. Kernan*, 49 N. Y. 169-172; *Morange v. Morris*, 32 How. 178.)

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O. W. Smith for respondent. If Shaver did not or could not give a good and sufficient deed then the action against him would be on the breach of contract, not on any implied warranty for failure of consideration. (16 Hun, 30; *Mark v. McGlynn*, 88 N. Y. 357; *Matter of Ross*, 87 id. 514; *Davis v. Clark*, id. 623; Code, § 1337; *Vrooman v. Turner*, 69 N. Y. 280, 285; *Lawrence v. Coz*, 20 id. 268; *Deming v. Leavitt*, 85 id. 30, 35.) This action will not lie until a demand and refusal are shown. (*Fuller v. Williams*, 7 Cow. 53; 6 id. 13; *Parker v. Parmelee*, 20 Johns. 130; *Dowden v. McCullom*, 59 N. Y. 373; *Camp v. Morris*, 5 Denio, 161; Sugden on Vend. [8th Am. ed.] 358; *Bumpeer v. Platner*, 1 Johns. Ch. 218.) Where both parties are innocent of any fraud there is no legal liability; the purchaser takes title at his own risk in such cases. (*Whittemore v. Farrington*, 76 N. Y. 457; *Bates v. Delevan*, 5 Paige, 307; *Burrill v. Jackson*, 9 N. Y. 535; *Whittemore v. Farrington*, 12 Hun, 349; affirmed, 76 N.Y. 452.) The plaintiff is estopped from recovering back this money from defendant. (*Lee v. Porter*, 5 Johns. Ch. 268; *Taplin v. Wilson*, 4 Hun, 244; *N. Y. & N. H. R. R. v. Marsh*, 12 N. Y. 308; 2 Sandf. 475; 22 Barb. 260.) The money having been paid by Hodge in settlement and compromise of the litigation then pending, in favor of the defendant, against Kilmer, before the county judge, cannot be recovered back. (*Graves v. Friend*, 5 Sandf. 568; *Russell v. Cook*, 3 Hill, 504; Chitty on Cont. 43, 44; *O'Keason v. Barclay*, 2 Penn. 531; *Crans v. Hunter*, 28 N. Y. 389; *Stewart v. Abrenfeldt*, 4 Denio, 189; *Seaman v. Seaman*, 12 Wend. 381; 32 Barb. 256; 35 id. 641; 4 Denio, 180; 1 Bouv. Inst. n. 798-9.) When the contract was paid by Hodge, such payment having been made voluntarily, without any objection or protest to the defendant, who was authorized to receive such payment, and who was the legal *bona fide* owner, the money cannot be recovered back. (*N. Y. & Harlem R. Co. v. Marsh*, 12 N. Y. 308; *Silliman v. Wing*, 7 Hill, 159; 2 Denio, 26; 11 How. 526; 28 N. Y. 394; 2 Sandf. 475; 3 Hill, 504; 4 Denio, 189; *Taplin v. Wilson*, 4 Hun, 248.)

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Where the parties are equally innocent or equally negligent, the one paying cannot recover from the other. (76 N. Y. 452; 12 Hun, 349; Willard's Eq. Jur. [Potter's ed.] 72; *Elting v. B'k of U. S.*, 11 Wheat. 59; *Wyman v. Farnsworth*, 3 Barb. 369; 1 Story's Eq. Jur. 150; 1 Fonbl. Eq., B. 1, chap. 2, note 5; 1 Powell on Con. 200; Willard's Eq. Jur. 72; 1 Story's Eq. 151; *Davis v. Morris*, 36 N. Y. 569, 574; Shearm. & Redf. on Neg. 34; 34 Iowa, 568.) Before plaintiff can recover he must show an eviction or actually surrender the premises to defendant. (*Allerton v. Allerton*, 50 N. Y. 670; *Gale v. Nixon*, 6 Cow. 445; *More v. Smedburgh*, 8 Paige, 600; *S. C.*, 4 Wend. 238; *Tompkins v. Hyatt*, 28 N. Y. 347; *Viele v. T. R. R. Co.*, 20 id. 184; *Coray v. Matthewson*, 7 Lans. 80; 7 Johns. 122; 5 Cow. 195; 11 Johns. 122; 9 Wend. 80; 13 Barb. 230; 23 id. 461.)

DANFORTH, J. Under the contract from James R. Shaver to William T. Kilmer, the latter at once took possession of lots 10 and 11, and on the payment, to Shaver, of installments, in all amounting to \$1,500, was to receive from him a quitclaim deed of lot 10, and a good and sufficient deed of lot 11. This contract was assigned by Shaver to the defendant's testator, A. C. Edgerton, and he collected from Kilmer \$200, part of the money due thereon. Afterward Kilmer transferred his interest in the contract to one John Hodge, who paid Edgerton at different times, and in all the balance of the money called for by the contract, and then demanded of him a deed or repayment of the money so paid, and being refused, assigned to Youmans all rights of action which had accrued to him against Edgerton. Kilmer also assigned to him any claim which he might have growing out of these matters. One Knapp was at all times the legal owner of lot 11, and Shaver held under a land contract from him. The plaintiff brought this action for the moneys paid by Hodge and Kilmer to Edgerton. There has been no express promise by Edgerton, and the action, if supported at all, must be founded on an implied one. I cannot find even *prima facie* evidence of this. The assignment by Shaver to Edgerton did not, nor did it pur-

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port to, transfer any right in the land, or impose upon him any obligation. It was a mere authority to receive the moneys called for by its terms and apply them to his own use. With notice of this limitation, the party paying the money is chargeable. The plaintiff's case is, therefore, not different from what it would have been, if, as each payment became due, Shaver had given, for value, an order on the vendee to pay the same to Edgerton, or an assignment in form of each separate installment. In neither case could the debtor, if he accepted the order, or assented to the assignment, set up in defense of payment any equity between himself and the assignor, nor after payment recover back the money upon showing even such equity as would have been a defense as between himself and the assignor. Nor is there any equity in the plaintiff's favor. Kilmer's promise to pay Shaver was in consideration of Shaver's promise to him, and the actual possession of the land. Hodge paid in consequence of a consideration moving from Kilmer, and Shaver's assignment of Kilmer's promise, was fully paid for by Edgerton. The plaintiff relies upon the doctrine that an action may be maintained against an agent who receives money to which his principal has no right, but if that doctrine applies at all, its qualification protects the defendant. The qualification is that the money is still in the agent's hands, not yet paid over to the principal. (*Holland v. Russell*, 1 Best & Smith, 424; *Zychlinski v. Malby*, 14 C. B. [N. S.] 322.) Here the money was paid by Edgerton before it was received from the plaintiff's assignors, and they paid Edgerton because he had acquired the right to it, not as agent, but as owner. It is also urged that the assignee of Shaver obtained no better right to receive the money than Shaver had. But his right in this respect was good enough. The promise to pay the installment was not induced by any fraud, nor was it dependent upon a promise to give a title. His inability to do so now is the only equity relied upon by the plaintiff, but that had not arisen at the time of the assignment, nor could it have been insisted upon when the installments matured, nor at the time they were in fact paid. Shaver himself might have

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sued for each as it came due and succeeded, although had he waited until the whole purchase-money was due, the case might have been different. (*Beecher v. Conradt*, 13 N. Y. 108.) The defendant stood in his place, and although subject to the same equities as his assignor, they are those only which were available at the time of the assignment (*Myers v. Davis*, 22 N. Y. 489), and even these might be released or waived by the person entitled to them, either expressly or by implication arising from his conduct; and although there has been here no release in words, the acts of the plaintiff's assignor are equally conclusive. Kilmer assented to the assignment by Shaver, and both Kilmer and Hodge made promise of payment, and then payment to the defendant of the moneys which have been allowed by the referee against him. There is no principle upon which the recovery can stand, and the only case cited by the appellant, which at all sustains it, is *Smith v. McCluskey* (45 Barb. 610). That case, however, is not only opposed to the views already expressed, but the judgment now before us shows that it has not been followed, even by the court which made it (16 Hun, 28), and upon the point now involved, we think, the last stands upon a better interpretation of the law. It is contended, however, by the appellant that the referee's finding may be supported upon the ground that at the time of payment, all parties were ignorant that the title was in Knapp and not in Shaver. But this is not material. This mistake did not create a supposed legal obligation. The obligation was expressed in the contract. If Shaver and not Knapp had the title, that fact would in no respect have given Edgerton a right against Kilmer or Hodge, nor would it have added to their duty to observe the terms of the contract. It might have made it more desirable for them to do so, but that is not sufficient. (*Aiken v. Short*, 1 H. & N. 210.) Upon the facts found by the referee, the plaintiff might have an action against Shaver for breach of contract, or by suit for specific performance, but none against Edgerton, either upon legal or equitable grounds; the money which he got was actually due to him, and there can be no obligation to refund it.

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It follows that the judgment entered upon the report of the referee was properly reversed — that the order of reversal and for a new trial should be affirmed, and by reason of the plaintiff's stipulation, the defendant have judgment absolute, dismissing the complaint, with costs.

All concur, except EARL, J., dissenting.

Order affirmed and judgment accordingly.

MARY REID, as Administratrix, etc., Appellant, v. HUGH McCRUM, impleaded, etc., Respondent.

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A covenant in a mortgage, to keep buildings on the mortgaged premises insured for the benefit of the mortgagee, is not a covenant running with the land, but is entirely personal in its character.

The holder of the mortgage, therefore, cannot claim the benefit of insurance upon the buildings procured by one holding under a conveyance of the equity of redemption from the mortgagor.

Where, however, the owner of the fee, who by his deed took subject to the mortgage, procured insurance, and by directions of his general agent, who had charge of all his business, including insurance, indorsements were made upon the policies, making the loss, if any, payable to the mortgagee, *held*, that the latter was entitled to the insurance, and that his right was not affected by a revocation of the direction and a cancellation of the indorsement made, without his knowledge or assent, by the agent

(Argued January 25, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 9, 1882, which affirmed, so far as appealed from, a judgment, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendants David Donald and Hamilton Waddell. Subsequent to the giving of the mortgage, the mortgagors conveyed the premises, and the title was, at the time of the commencement of the action, in defendant Hugh McCrum, who claimed under various *mesne* conveyances, all of which were in

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terms subject to the mortgage. This instrument contained a covenant on the part of the mortgagors to keep the buildings on the premises insured, the policies to be assigned to the mortgagee, who in case of default was authorized to insure, and the premiums in such case were declared a part of the mortgage debt. Said McCrum during the time he owned the property resided in California. He carried on business on the premises, of which his brother John J. McCrum had the entire charge and management, including the charge of all insurance. The buildings were, previous to the foreclosure, destroyed by fire; at that time there were twenty-two policies of insurance upon the buildings and the stock and fixtures therein. These were all procured by said agent, and by their terms were made payable to Hugh McCrum, as owner. As to four of the policies which contained insurance on the buildings to the amount of \$1,666, the referee found that plaintiff had no knowledge of them, but that subsequent to the issuing thereof "by direction of John J. McCrum, without the knowledge, authority or assent of defendant Hugh McCrum," an indorsement was made thereon, "loss, if any, payable to John Reed, mortgagee." That thereafter said John J. McCrum caused said indorsement to be erased and the same to be made payable to defendant Hugh McCrum and the following indorsement to be made thereon: "The mortgagee's interest having ceased, the loss, if any, is now payable to Hugh McCrum as owner." Further facts as to said four policies appear in the opinion. Plaintiff made the various insurance companies defendants and asked that defendant Hugh McCrum be required to assign to him the insurance upon the buildings and that insurance companies be required to pay over to plaintiff the several amounts due under their policies for loss upon buildings. The court decided that plaintiff was not entitled to any of the insurance moneys, and an ordinary judgment of foreclosure and sale was rendered.

Jos. A. Burr, Jr., for appellant. When there is a covenant between the mortgagor and mortgagee to insure for the protection and indemnity of the mortgagee, this gives the mortgagee

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an equitable lien upon the money due upon the policy to the extent of his interest. (Thomas on Mortgages, 176; Jones on Mortgages, § 400; *Carter v. Rockett*, 8 Paige, 437; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Hayward v. Draper*, 7 Allen [Mass.] 267; *Thomas v. Van Rapp*, 6 G. & J. 372; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 446; *Providence Co. B'k v. Benson*, 24 Pick. 210; *Lazarus v. Comm. Ins. Co.*, 2 Am. Lead. Cases, 834; *King v. Ins. Co.*, 7 Cush. 1; *Mittenberger v. Bascom*, 9 Penn. St. 198; *In re Sands' Ale Brewing Co.*, 3 Biss. 175; *Nicholas v. Baxter*, 5 R. I. 491; *Miller v. Aldrich*, 31 Mich. 408.) If the covenant to insure runs with the land, it binds and affects all persons claiming or occupying under the covenantor, and plaintiff and defendant Hugh McCrum are in the same position as though they had been the original mortgagee and mortgagor or as if Hugh McCrum, upon purchasing the premises, had expressly agreed to perform said covenant. (*Duffy v. N. Y. & H. R. R. Co.*, 2 Hilt. 496.) The covenant to insure contained in the mortgage, is a covenant running with the land. (2 Wash. on Real Prop. [4th ed.] 284-287; *Cole v. Hughes*, 54 N. Y. 458; *Trustees of Columbia College v. Lynch*, 47 How. Pr. 273; *Hurd v. Curtis*, 19 Pick. 459, 464; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; 4 Kent's Com. [12th ed.] 480, note 1; 1 Abb. Law Dict., title "Estate"; *Cutts v. Comm.*, 2 Mass. 289; *Palmer v. Miller*, 23 Barb. 399; *Excelsior F. Ins. Co. v. R. Ins. Co. of Liverpool*, 55 N. Y. 359; *Wyman v. Prosser*, 30 Barb. 368; *Hastings v. West. F. Ins. Co.*, 7 Weekly Dig. 60; *Cushing v. Thompson*, 34 Me. 496; *Carpenter v. Prov. & W. Ins. Co.*, 16 Peters, 495; *Wilson v. Hill*, 3 Metc. 69; *Colombian Ins. Co. v. Lawrence*, 10 Peters, 507; *Donald v. Black*, 20 Ohio, 185; *Masury v. Southworth*, 9 id. 340; 2 Platt on Leases, 226, 228; Platt on Covenants [3 Law Lib.], 183; Platt on Leases, 119; *Vernon v. Smith*, 5 B. & Ad. 6; 1 Jones on Mortgages, § 409; *Rowley v. Palmer*, 5 Gray, 49; *Mix v. Hotchkiss*, 14 Conn. 32.) The contract of insurance being an insurance of the property, the payment by the insurance companies to the mortgagee of the sum insured upon policies taken out by the mortgagor for the mortgagee's

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benefit extinguishes the mortgage "*pro tanto*." (*Waring v. Loder*, 53 N. Y. 581; *Clinton v. Hope Ins. Co.*, 45 id. 467; *Wood v. N. Y. Ins. Co.*, 46 id. 421; *Springfield Ins. Co. v. Allen*, 43 id. 393; *Kernochan v. N. Y. Bowery F. Ins. Co.*, 17 id. 428; *Lawrence v. St. M. F. Ins. Co.*, 43 Barb. 479; *Benjamin v. Saratoga Mut. F. Ins. Co.*, 17 N. Y. 415; *Cromwell v. Brooklyn F. Ins. Co.*, 44 id. 47; *Foster v. Reed*, 70 id. 19; *Ulster County Sav. Inst. v. Howe Ins. Co.*, 73 id. 161; *Phoenix Ins. Co. v. Floyd*, 19 Hun, 287; *Blaine v. Taylor*, 19 Abb. Pr. 228; *Meyer v. Burns*, 33 Barb. 401; affirmed, 35 N. Y. 269; *Allen v. Culver*, 3 Denio, 284; *Norman v. Wells*, 17 Wend. 148; *Astor v. Hoyt*, 5 id. 603; *Post v. Kearney*, 2 N. Y. 394; *Denman v. Prince*, 40 Barb. 213; 1 Wash. on Real Prop. [4th ed.] 499; *Vernon v. Smith*, 5 B. & Ald. 1; *Doe v. Peck*, 1 id. 428; *Thomas v. Van Kapp*, 6 G. & J. 372; *In re Sands' Ale Brewing Co.*, 4 Biss. 175; *Miller v. Aldrich*, 31 Mich. 408.) The mere fact that the covenant in the mortgage contains a provision that, in default of compliance with such covenant, the mortgagee himself may insure, is no bar to this action. (*Nichols v. Baxter*, 5 R. I. 491; *In re Sands' Ale Brewing Co.*, 3 Biss. 180.) Even if the covenant does not run with the land at law, it is binding in equity upon an assignee of the land with notice. (*Suker v. Dennis*, Law Rep., 7 Ch. Div. 227; *Miller v. Aldrich*, 31 Mich. 408, 413, 417, 418.) The defendant, Hugh McCrum, having through his agent expressly agreed to procure policies and assign them to Mr. Reid, the court should give effect to such agreement by compelling such an assignment. (Bigelow on Estoppel, 368; *Griswold v. Haven*, 25 N. Y. 595; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30.) When a policy of insurance is taken out by the mortgagor in his name, and contains a clause "loss, if any, payable to the mortgagee," it would seem to be an insurance of the interest of the mortgagor, with an irrevocable power of attorney to the mortgagee to receive the avails of the insurance in case of loss and apply it upon the mortgage debt. (*Buffalo S. E. Works v. Sun Mut. Ins. Co.*, 17 N. Y. 406;

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Grosvenor v. A. F. Ins. Co., id. 395; affirming 5 Duer, 517; *Luckey v. Gannon*, 37 How. 134, 138; *Ennis v. Harmony F. I. Co.*, 3 Bosw. 516; Thomas on Mortgages, §§ 406, 407.)

Rufus L. Scott for respondent. The lien of the mortgage does not give any right to, or any equitable lien upon insurance moneys. (*Carter v. Rockett*, 8 Paige, 437; *Cromwell v. B'klyn F. Ins. Co.*, 44 N. Y. 47.) The taking of a deed subject to a mortgage, or any other personal covenant, does not create any personal liability upon the part of the grantee. He cannot be bound except by assumption or agreement upon his part. (*Scott v. McMillan*, 76 N. Y. 141; *Stebbins v. Hall*, 29 Barb. 524.) A covenant of insurance in a mortgage is a mere personal covenant, and does not run with the land. (*Carter v. Rockett*, 8 Paige, 437; *Cromwell v. B'klyn F. Ins. Co.*, 44 N. Y. 47; *Wyman v. Prosser*, 36 Barb. 368; *Cushing v. Thompson*, 34 Me. 496; *Carpenter v. Prov. & Wash. Ins. Co.*, 15 Peters, 495; *Wilson v. Hill*, 3 Metc. [Mass.] 69; *Douglass v. Murphy*, 16 U. C. Q. B. 113; *Norman v. Wells*, 17 Wend. 138; *Hastings v. Westchester F. Ins. Co.*, 73 N. Y. 141; *Columbian Ins. Co. v. Lawrence*, 10 Peters, 507; *Donald v. Black*, 20 Ohio, 185; *Dunlop v. Avery*, 23 Hun, 509; 1 Smith's Lead. Cases, 139; *Masury v. Southworth*, 6 Ohio L. R. 340; *Lee v. Whitely*, Law Rep., 2 Eq. 143; Thomas on Mortgages, 176; 1 Washburn on Real Estate, § 6, p. 497; 2 id. 286, 288; 2 Platt on Leases, 226-228; Platt on Covenants, 183.)

MILLER, J. In the case of *Dunlop v. Avery* (89 N. Y. 592), it was held that a covenant to insure contained in a mortgage was not a covenant running with the land; that it was entirely personal in its character and did not affect the land and was collateral and incidental to the remaining covenants in the mortgage. That decision is a complete answer to the claim made by the appellant's counsel, that the covenant to insure contained in the mortgage in this case runs with the land, and the question must be regarded as *res adjudicata*, unless some

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reason exists why the case cited should not be followed and adhered to. Authorities are cited in support of that decision, and no doubt is expressed in the opinion in regard to the correctness of the rule there laid down, nor is there, we think, any ground for claiming that the question at issue was not involved in that case, as the point was distinctly presented, and if the covenant to insure was a covenant running with the land, then the plaintiff was clearly entitled to recover.

It is true that the question of imputed notice was an important and material point in that case, and the trial court and the General Term held that the defendant took his mortgage with notice and knowledge of the covenant, to insure which was contained in the record of the plaintiff's mortgage. As the plaintiff's right would have been maintained if the covenant had been one running with the land, there is no ground for claiming that the question was not presented to, and decided by, the court. The fact, that in the case cited the land was still in the hands of the original obligor, can make no difference, and we think the position of the appellant's counsel that because no one had bought no one could be affected by it, did not affect or impair the right of the mortgagee to claim the benefit of the covenant, if it was one running with the land. In the above case the plaintiff claimed, as senior mortgagee, and that the covenant to insure entitled him to the insurance money, and the defendant claimed as a junior mortgagee. If the covenant ran with the land the plaintiff clearly had an equity which was superior and prior to that of a subsequent incumbrancer, and this by virtue of the covenant which gave him the prior right and which could not be disturbed or destroyed by an assignment of the policy to a junior mortgagee. We are, therefore, unable to perceive why the case cited is not a direct authority upon the question under consideration, and we think the remarks in the opinion therein on this point are not *obiter dictum*, as claimed. Assuming, however, that the question is before us we are of the opinion, after an examination of the elaborate brief of the counsel for the appellant and the authorities cited, that the covenant in question did not run with the land. There is a distinc-

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tion between a case where there is a covenant to rebuild or repair upon the destruction of the property by fire, and where there is no such covenant, and while there may be some reason, perhaps, for sustaining the former covenant as running with the land, there is none whatever for upholding the latter. It may be remarked that as the question is not presented here we are not, therefore, called upon to express an opinion in regard to the effect of a covenant which contains the provision referred to as to rebuilding and repairing. A careful examination of the authorities presents no case where it has been distinctly held that a simple covenant of insurance runs with the land. The counsel for appellant claims that he is entitled to recover on four of the policies, amounting together to the sum of \$1,050 on the buildings, if not the full amount of all the policies. This position is based upon the ground that an indorsement was made in September, 1880, upon these policies by direction of the agent of the defendant. "Loss, if any, payable to John Reid, mortgagee." It appears that in December, 1880, John J. McCrum, the agent above named, procured the indorsement to be erased and instead thereof the following to be made: "The mortgagee's interest having ceased, the loss, if any, is now payable to Hugh McCrum as owner." Upon these facts the question arises whether the alteration made changed the disposition to be made of the insurance money. The respondent's counsel insists that the original indorsement was made without the authority of the owner; that the policies were never delivered to Reid, and that he had no knowledge of them previous to the fire in May, and that they covered stock and machinery upon which Reid claimed no lien, and that they covered over five times in amount on stock and machinery more than on buildings.

As a general rule, where a policy is taken out, with loss payable to a particular individual, such person is entitled to the amount of the policy in case of loss. Could this direction be revoked without the consent of the person for whose benefit it appeared to have been made? On its face it was a contract of the insurance company to pay the money in case of loss to the person named, and if it had remained unrevoked, such

person would clearly have been entitled to the same. The appellant never consented to the change of indorsements, and the court so found. The original indorsement would not be an absolute assignment of the policy, nevertheless the mortgagee would be entitled to the benefit of such indorsement if made on his behalf, and if there was authority to direct the indorsement the plaintiff would be entitled to any loss on these policies, so far as it occurred on the buildings insured. The court, however, found that the indorsement was made by the direction of John J. McCrum, without the knowledge, authority or assent of the defendant Hugh McCrum. This finding, we think, is not supported by the evidence. The testimony shows that John J. McCrum was the general agent of Hugh McCrum and also his agent in regard to insurance, the same as in reference to the business of Hugh, which was under his charge. There is also evidence, which is not contradicted, that John made a statement to the plaintiff's intestate to the effect that policies were issued in the name of Mr. Reid. It appears that the four policies named in the ninth finding were in accordance with this statement. If these policies had been delivered to Mr. Reid or to his agent, or to any person on his behalf, there would be no question but that he would have been entitled to the amount of the loss upon the same; that they were not delivered, we think, can make no difference. They were left with the insurance agent evidently for the benefit of Mr. Reid. The contract was thus in effect partially executed, and being thus executed the defendant Hugh McCrum is estopped from claiming that it could be changed afterward without the assent of Mr. Reid. The agent was acting within the scope of his authority in obtaining the policies, and as he contracted that the loss be made payable to Mr. Reid, and as this was done and the policies left for the benefit of Mr. Reid, we think it cannot be urged that he exceeded his power. The statement of the agent that the policies should be issued in the name of Mr. Reid, without any thing being done to carry it out, presents a different question, and it is not apparent how such an arrangement, entirely unexecuted, could

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bind the principal, without direct proof of authority to that effect.

When, however, the contract has been carried into effect it cannot be said that the indorsement was made on the four policies without the knowledge, authority or assent of the defendant, and that the agent was authorized subsequently to direct the alteration which was made. We think there was no question as to notice of the existence of the covenant to the defendant arising in this case which requires examination. Nor is there sufficient evidence of any agreement to assign the policies by the defendant which entitles the plaintiff to the avails thereof. The court refused to find in this respect as requested by the appellant's counsel, and we are not prepared to say that such refusal was erroneous.

The other questions presented have received due attention and do not require comment.

For the error stated the judgment should be reversed and a new trial granted, with costs to abide the event, unless the defendant stipulates that the decree be modified so as to allow the plaintiff the amount of loss upon the real estate which was adjusted upon the four policies which were made payable to John Reid, mortgagee. In which case the judgment as modified should be affirmed, without costs of appeal in this court to either party.

All concur.

Judgment accordingly.

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ROBERT Y. WENDELL et al., Administrators, etc., Respondents,
v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

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Although from an infant, if *sui juris*, a less degree of care is required than from a person of mature age, yet he is chargeable with some degree of care and prudence in approaching a known danger, and is responsible for the consequences of some degree of negligence; and in an action for injuries to him occasioned by negligence of another, absence of this degree

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of negligence on his part must be made to appear to authorize a recovery.

In an action to recover damages for alleged negligence causing the death of W., plaintiffs' intestate, who was killed at a crossing on the defendant's road, in the city of S., it appeared that the deceased was a bright, active boy seven years of age, considered competent by his parents to go to school and on errands alone. He was in the habit of crossing the railroad tracks at the place where the accident happened; he had been stopped while attempting to cross by the flagmen stationed at that point, and had been before cautioned by them against attempting to cross in front of an approaching train. Shortly before the accident the deceased was standing near the flagman's shanty with a companion, on the street fifty-one feet from where he was struck; the approaching train was in plain sight from the place where he stood for a distance of about five hundred feet from the crossing. The flagmen (two in number) had left the shanty and approached the track, in the performance of their duty. The boys both started on a run to cross in front of the train; the flagmen shouted to them to stop and waved their flags; one of the flagmen, who stood on the sidewalk ten or fifteen feet distant from the track on which the train was approaching, endeavored to intercept the deceased, but he eluded him and reached the track, where he slipped and fell and was killed. *Held* (DANFORTH, J., dissenting), that a motion for nonsuit on the ground of contributory negligence was improperly denied.

(Argued January 29, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 27, 1882, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

Hamilton Harris for appellant. The jury must be authorized to find affirmatively that the person injured was free from fault which contributed to the accident, or the action cannot be maintained. (*Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N.Y. 248; *Weber v. N. Y. C. & H. R. R. Co.*, id. 451; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Thompson on Neg.* 1236; *Rudolph v. Fuchs*, 44 How. Pr. 160.) The law does not require of an infant of tender years the same degree of care as is re-

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quired from an adult, and the degree of care required is to be graduated by the age and capacity of the individual, but this does not change the well-settled rule as to contributory negligence. (*Byrne Case*, 83 N. Y. 622; *Sheridan Case*, 36 id. 43; *McGovern Case*, 67 id. 417; *Thurber Case*, 60 id. 326.) The refusal of the request to charge, that there was no proof to warrant the jury in finding that the deceased did not know the danger of crossing the track in front of the locomotive, was error. (*Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330.) The defendant was free from any negligence contributory to the injury. (*McGrath Case*, 63 N. Y. 528; *Salter Case*, 88 id. 56; *Knuffke v. Knick. Ice Co.*, 84 id. 488; *Calligen Case*, 59 id. 651.) The court erred in charging that "the rights of the persons who may traverse that street and the rights of the railroad company which runs its trains there, are to be exercised together in a proper and reasonable manner;" and again, "you must not give undue prominence to the rights of citizens as against the railroad company, nor to the rights of the railroad company as against the citizens." (*Adolph Case*, 76 N. Y. 534.)

Arthur A. Yates for respondents. The high rate of speed at which defendant was running at the crossing was negligent, although every statutory signal was given. (*Costello's Case*, 65 Barb. 92; *Wilds v. Hudson River R. R. Co.*, 21 N. Y. 315; *McGovern v. N. Y. C. & H. R. R. R. Co.*, 67 id. 417, 420, 421; *Grippin v. N. Y. C. & H. R. R. R. Co.*, 40 id. 34.) Persons of "ordinary experience" and not experts alone may testify as to speed of trains. (*Salter v. U. & B. R. R. R. Co.*, 59 N. Y. 631; *Nearing v. N. Y. C. R. R.*, Gen. Term, third dept., 12 Weekly Dig. No. 9, p. 205; *McGrath v. N. Y. C. R. R. Co.*, 65 N. Y. 330; *Massoit v. N. Y. C. & H. R. R. R. Co.*, 64 id. 424; *Jetter v. N. Y. C. & H. R. R. R. Co.*, 2 Abb. Ct. of App. 458.) There was no negligence on the part of the deceased which contributed to his death. (*Hawks v. Winans*, 10 J. & S. 451; *Costello's Case*, 65 Barb. 92; *Thurber v. H. B. M. & F. R. R. R.*, 60 N. Y. 33; *Belton v. Baxter*, 58 id. 411;

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3 Abb. Ct. of App. 274; *Baxter v. Second Ave. R. R. Co.*, 3 Robt. 310; *Aaron v. Second Ave. R. R. Co.*, 2 Daly, 127.) Negligence cannot be imputed to the parent of the child, or those having him in charge. (*Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49; *Thurber v. H. B. M. & H. R. R. Co.*, 60 id. 333, 335; *Mangam v. N. Y. C., etc.*, 39 id. 455, 459; 41 Eng. Com. Law, 422; *McGovern's Case*, 67 N. Y. 421.) To justify a nonsuit on the ground of contributory negligence the undisputed facts must show the omission or commission of some act which the law adjudges negligence. (*Stackus v. N. Y. C., etc.*, 79 N. Y. 464; *Chadbourn v. D. L. & W. R. R. Co.*, 6 Daly, 215.) An infant is not held to the same degree of care to which an adult should be held. (*Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *Sheridan v. B. & N. R. R. Co.*, 36 id. 42; *O'Mara v. H. R. R. R. Co.*, 38 id. 444; *Costello's Case*, 65 Barb. 92; *Mowry v. Cent. City R. R. Co.*, 51 N. Y. 666; *Reynolds v. N. Y. C., etc.*, 58 id. 252; *McGarry v. Loomis*, 69 id. 107; *Fallon v. Cent. Park N. E. R. R.*, 64 id. 13; *McGovern's Case*, 67 id. 517; *Haycroft v. L. S. & M. S.*, 3 Hun, 191; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 518; *Byrnes v. N. Y. C.*, 83 id. 620; *Mangam v. B. R. R. Co.*, 38 id. 455, 458; *Lynch v. Mandin*, 42 Eng. Com. Law, 422; *Dowling v. N. Y. C. R. R.*, 15 Week. Dig. 471; *Powell v. N. Y. C.*, 22 Hun, 56; *Thurber v. H. B. M. & T. R. R. Co.*, 60 N. Y. 334, 335; *McGovern v. N. Y. C.*, 67 id. 417.) The whole question of negligence belongs to the jury. (*Hart v. Hudson River B. Co.*, 80 N. Y. 622; *Payne v. N. Y. C.*, 83 id. 572, 579; *Stackus v. N. Y. C.*, 79 id. 465, 469; *Hill v. N. Y. C. R. R. Co.*, 2 Week. Dig. 95; *Urquhart v. City of Ogdensburg*, 13 Week. Dig. 109.) The degree of care required of an infant, and whether that degree has been exercised, is always a question for a jury. (*Sheridan v. N. R. R. Co.*, 36 N. Y. 43; *O'Mara v. H. R. R. R. Co.*, 38 id. 445; *Costello's Case*, 65 Barb. 92; *Fallon v. Cent. Park N. & E. R. R. Co.*, 64 N. Y. 13; *Byrnes v. N. Y. C.*, 83 id. 622; *Dowling v. N. Y. C.*, Week. Dig., No. 20, p. 47.) The defendant was crim-

inally negligent. (Laws of 1879, chap. 273.) Against gross carelessness contributory negligence is no defense. (*Kenyon v. N. Y. C.*, 5 Hun, 479; *Green v. Erie R. R.*, 11 id. 334.)

RUGER, Ch. J. This action was brought to recover damages for the alleged negligent killing of Henry P. Wendell, the plaintiffs' intestate, by the defendant.

At the close of the plaintiffs' case the defendant moved to nonsuit upon the ground that the carelessness of the deceased contributed to the injury which occasioned his death. At the close of the whole evidence this motion was renewed upon the additional ground that there was no proof of negligence on the part of the defendant which contributed to the injury. These motions were denied and the defendant duly excepted.

This case is singularly free from conflicting evidence and of circumstances attending the casualty which would lead men of ordinary prudence and judgment to differ in regard to the cause of the accident.

The only material points upon which there occurs any discrepancy in the testimony of witnesses relates to the speed of the train and the distance of the train from the plaintiffs' intestate when he fell. The alleged dangerous speed of the train at the time of the accident is the only ground upon which negligence is imputed to the defendant. The plaintiffs produced several witnesses who occupied a point of view directly in front of the approaching train, and who testified that in their judgment the train approached the place of accident at the rate of from fifteen to twenty-five miles an hour. This comprised all of the plaintiffs' evidence upon this point.

From the uncontradicted facts in the case it appeared that the accident occurred at a street crossing in the city of Schenectady, within five hundred feet from where the locomotive usually stopped at this station; that the train on this occasion stopped at its customary place, leaving one-third of its length below the point of the accident. The testimony of the experts showed that a train running faster than ten miles an hour

could not be stopped within that distance. The train hands testified that the train ran no faster than that. Considering this evidence in connection with the fact that the defendant employed two flagmen to warn travelers at this crossing, and that they were both actively engaged in the performance of that duty at the very time of the accident, it would seem to render it doubtful whether the charge of negligence against the defendant could fairly be sustained. This question was, however, left to the jury by the court below, and we do not consider it necessary to disturb their verdict upon this point.

We are, therefore, required to examine the question as to whether the plaintiffs' intestate was guilty of negligence in approaching the track.

At the time of the accident he was a bright, active boy about seven years of age, considered competent by his parents to go to school and upon errands alone. He was sometimes intrusted with the duty of driving a horse and wagon, and was in the habit of crossing the railroad track at the place where the accident occurred. Previous to the accident he had been stopped while attempting to cross by the flagmen stationed at that point, and had been before cautioned by them against attempting to cross in front of an approaching train. The accident happened in broad day-light, and from the place where it occurred a train could be seen for upwards of five hundred (500) feet south of the crossing. The street on which the boy was passing (Main street) marked the southern boundary of the settled part of the city. No buildings lined the railroad south of Main street, and from the point where the boy started to cross the track, no object intercepts a view of an approaching train for a long distance.

No conflict as to these facts appears in the evidence, and they are mainly proven by the statements of the plaintiffs' witnesses.

The case was tried upon the assumption by the court and both parties that the deceased was *sui juris* and that his parents were not chargeable with negligence in permitting him to be in the place where he was injured. In fact at the time of

the accident he was upon an errand for his mother which required him to cross this railroad track.

The assumption that the boy was *sui juris* implies that he had sufficient mental and physical capacity to be chargeable with the exercise of some degree of care and prudence and responsible for the consequences of some degree of negligence, but doubtless, owing to his tender years, a lesser degree of care was required of him than of one of mature age.

Nevertheless an infant, whatever his age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger. (*Honegsberger v. The Second Avenue R. R. Co.*, 1 Keyes, 570.) If the infant be of tender years and not *sui juris*, the negligence is imputable to his parents or guardians. If he be *sui juris*, it is imputable to himself. (*Thurber v. Harlem, B. M. & F. R. R. Co.*, 60 N.Y. 333.) But as was said by COWEN, J., in a case where the infant was between two and three years of age (*Hartfield v. Roper*, 21 Wend. 620): "When he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury;" and whenever it affirmatively appears either that the injury was occasioned by the fault of the party injured, or where there is an entire absence of evidence showing that he is free from fault, he cannot recover.

The doctrines of this case have been cited and approved in numerous cases and are now well settled in this State. In the case of *Reynolds v. N. Y. C. & H. R. R. Co.* (58 N. Y. 248), this court decided that this rule required a nonsuit when the affirmative proof did not authorize the jury to find the absence of fault on the part of the injured infant.

It is true that the evidence of proper caution in approaching a dangerous place may appear either by direct proof or by proof of such facts and circumstances as would authorize the jury to find an absence of fault, but that fact must be made to appear by the plaintiff in one form or another. Without such proof, the court must non-suit the plaintiff.

As was said by EARL, J., in *Cordell v. N. Y. C. & H.*

R. R. R. Co. (75 N. Y. 332): "To maintain this action the plaintiff must show that the death of the intestate was caused solely by the negligence of the defendant, and this she must show by competent evidence." If the facts all point to the single conclusion that the deceased was negligent the court is bound to nonsuit.

The rule is stated by ALLEN, J., in *Thurber v. Harlem, B. M. & F. R. R. Co.* (60 N. Y. 331): "*When the inferences to be drawn from the proof are not certain and incontrovertible it cannot be decided as a question of law by directing a verdict or nonsuit, but must be submitted to the jury.*"

Negligence is a question of fact and should usually be decided as such, especially *whenever men of ordinary prudence and discretion might differ as to the character of the act*, under the circumstances of the case, the positions and conditions of the parties." (See also *Morrison v. Erie Railway Co.*, 56 N. Y. 308.) It is, however, at war with settled principles, to hold that when the facts show that an injured party has been guilty of negligence, much more of willful and persistent recklessness in approaching a known danger, that a court should permit a jury to charge the consequences of such conduct upon another party.

In the light of these principles let us examine the circumstances of this case. Shortly before the accident the deceased with a companion two years older was standing near the flagman's shanty on the south side of Main street and fifty-one feet east from where he was struck.

The flagmen had left the shanty and approached the track in the performance of their duty. The approaching train was in plain sight from the place where the boys stood for a distance of about five hundred feet from the crossing. They both suddenly started on a run on the south sidewalk of the street, the older boy some fifteen feet in advance, to cross in front of the approaching train. The flagmen who faced the boys shouted to them to stop, and waved their flags as signals to them. The older boy passed the flagmen and crossed in safety.

Eckel, one of the flagmen, stood on the sidewalk ten or fifteen feet from the track on which the train approached and endeavored to intercept the deceased, but the latter eluded him by either dodging or running under his outstretched arms, and reached the track when he slipped and fell. The flagman followed and endeavored to rescue him, but the train was so near that he failed in his attempt, and the boy was killed.

It appeared that there was a team standing in the middle of the street where it had been stopped by the flagmen, and that while there were a few people on the northerly side of the street there were none on the southerly walk, except a woman and a child west of the tracks waiting for the cars to pass. It did not appear that there was any noise to distract the attention of passers-by except that which heralded the approach of the advancing train, the ringing of its bell and the warning shouts of the flagmen.

All of the by-standers were aware of the approaching train and seemed to anticipate danger to the boys.

Every circumstance seemed to attract attention rather than to divert it from this train and the danger to be apprehended therefrom. The boy knew the office to be performed by the flagmen for he had before seen them in the performance of their duty and had been warned by them. He knew, therefore, that a train was approaching, even if he had not before seen it.

Under the circumstances we think he was negligent, either in going upon the track without looking to see whether a train was coming or not, or if he did look and see it, in doing so while it was in such dangerous proximity. The exercise of active vigilance under such circumstances was a duty which the law imposes upon every person who attempts to cross a railroad track. He should not be permitted to make close calculations to determine whether he can safely pass in front of an approaching body, and when the experiment has failed, charge the consequences of his mistake upon the owner of the colliding vehicle, or property. (*Belton v. Baxter*, 54 N. Y. 246 ; 13 Am. Rep. 578.)

There is no question here as to any error of judgment, for such questions arise only when a party has without fault placed himself in a dangerous situation and is compelled to choose between the alternatives presented, upon the spur of the moment.

It is quite indicative of the weakness of the plaintiffs' case that they have felt themselves constrained to assert that the ringing of the bell on the defendant's train and the presence and conduct of the flagmen employed to warn travelers of its approach were possible causes of this catastrophe, thus argumentatively condemning the employment of the very precautions, for the omission of which, railroad corporations have so frequently been adjudged guilty of negligence by the courts. The rules of conduct which should govern the approach of travelers to crossings over street railways or in the track of vehicles whose rate of progress is under the control of their drivers are necessarily quite different from those applicable to the crossing of the track of steam railroads whose trains traverse vast distances, carrying great burdens and moving with a momentum necessarily destructive to bodies with which they come in contact. It is within the knowledge and comprehension of the most immature that these agencies cannot be arrested in time to obviate danger to those coming in their way, and therefore a greater degree of care is imposed upon those who have occasion to use their tracks. (*Barker v. Savage*, 45 N. Y. 191.) While railroad corporations should be held to a strict degree of care in moving their trains in crowded and dangerous places, and through populous cities, it would be quite impracticable to require them to move them at such a rate of speed as to be able at all times to arrest their progress to avoid persons moving upon their tracks and thus insure their safety.

There is no point of view from which we can regard this case that would seem to sustain the finding of the jury that the plaintiffs' intestate was free from fault, contributing to the injury to recover damages for which this action is brought.

We are of the opinion that the court erred in refusing to nonsuit the plaintiffs upon the case as it appeared at the close

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of all of the evidence, and the judgment should, therefore, be reversed and a new trial ordered, with costs to abide the event.

DANFORTH, J. (dissenting), was of opinion that the question whether the evidence disclosed an absence of negligence on the part of the child contributing to his injury was, under the circumstances of the case, properly submitted to the jury, and he was, therefore, in favor of affirmance of the judgment appealed from.

All concur with RUGER, Ch. J. except DANFORTH, J., dissenting.

Judgment reversed.

In the Matter of the Petition of JAMES L. BARCLAY to vacate
an Assessment.

The provision of the act "to alter the map or plan of certain portions of the city of New York" (Chap. 897, Laws of 1867), which authorizes the payment of damages caused by the closing of "any street, avenue or road laid out on the map of the city of New York within the district specified," was not confined to the streets and avenues laid out by commissioners under the act of 1807 (Chap. 115, Laws of 1807), but included any road exhibited upon the map filed by said commissioners.

Accordingly *held*, that the owners of property fronting on the old "Bloomingdale road" were entitled to compensation for the closing thereof.

Also *held*, that by incorporating into said act of 1867 the provisions of the act of 1852 (§ 3, chap. 52, Laws of 1852), providing for the payment of damages by assessment upon the property benefited, it was the intention of the legislature to make the damages caused by the closing of said road payable by assessment, as so provided; and that, therefore an assessment for that purpose was valid.

(Argued May 30, 1883; decided March 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made April 10, 1882, which reversed an order of Special Term, vacating an assessment upon certain lots of the petitioner in the city of New York

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for closing "Bloomingdale road," and which denied the prayer of the petitioner.

The road was closed by the commissioners of Central park under chapter 697, Laws of 1867, and the damages to the owners of land on said road were assessed upon the property benefited.

John C. Shaw for appellant. Without some statutory authority to levy an assessment for the reimbursement of the city, the assessment is clearly void. (Dillon on Mun. Corp., § 605 and note; *Sharp v. Speir*, 4 Hill, 76.) Power to levy an assessment cannot be inferred from legislative authority permitting certain improvements to be made or liabilities to be created. (Dillon on Mun. Corp. 606 and note; *Wright v. Chicago*, 20 Ill. 522; *Columbia v. Hunt*, 5 Rich. [S. C.] 550; *Chicago v. Wright*, 32 Ill. 192; *Annapolis v. Harwood*, 32 Ind. 471; *Fairfield v. Radcliff*, 20 Iowa, 396.) The absence of any specific directions to levy an assessment is a clear legislative intention that the damage should be a public charge, and not a local burden. (*Matter of Robbins*, 82 N. Y. 131, 140; Laws of 1818, chap. 213, p. 1217, Valentine's Laws.) As the Bloomingdale road was not laid out on the map of the city, no right attached to the owners of property on it to receive any damages. (*Matter of Em. Ind. Svgs. B'k*, 75 N. Y. 388; *Matter of Deering*, 85 id. 1; Valentine's Laws, 807; chap. 223 of 1838, § 3; Sedgwick on Const., etc., 200.) The rule or principle upon which an assessment is levied, especially where it is impossible to see that any benefit can come to the party objecting, may always be inquired into. (*Longley v. City of Hudson*, 4 T. & C. 353; *Matter of P. E. School*, 75 N. Y. 326.)

James A. Deering for respondent. The board of assessors had jurisdiction to assess the loss and damage sustained by the owners damaged on the parties or lands benefited. (Laws of 1867, chap. 697, § 3; Laws of 1852, chap. 52; *People, ex rel. Ward, v. Asten*, 49 How. 405; *S. C.*, 52 N. Y. 623; *People*,

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ex rel. Carleton, v. Asten, 62 How. Pr. 140; *People, ex rel. Garrett, v. Assessors*, Sup. Ct. MSS.; *People, ex rel. Van Raden, v. Assessors*, id.; *People, ex rel. Doyle, v. Green*, 3 Hun, 755; *People, ex rel. Tyler, v. Green*, 64 N. Y. 606; *Dillon on Municipal Corporations*, § 500; *Comm. v. Cole*, 26 Penn. St. 209.) The words, "laid out upon the map of the city," are used in the act of 1867 synonymously or interchangeably with "laid out" and "heretofore laid out and established," and are to be interpreted as referring to streets and roads actually in existence or public use, or having in any way a public character. (*People, ex rel. Devlin, v. Asten*, 4 Hun, 461; 64 N. Y. 661; *People, ex rel. Deering, v. Asten*, Sup. Ct. MSS.) The assessors had power, and it was their duty to assess the loss and damage upon the property benefited by the closing. (Laws of 1867, chap. 697, §§ 3, 9; Laws of 1852, chap. 52, §§ 3, 4; *Sedgwick on Statutes*, 229; *Jones v. Dexter*, 8 Fla. 276; *Roeck v. Mayor, etc.*, 33 N. J. L.; *People, ex rel. Tyler, v. Green*, 64 N. Y. 606; *People, ex rel. Doyle, v. Asten*, 3 Hun, 755; *Callender v. Marsh*, 1 Pick. 418; *Radcliff v. Mayor*, 4 Comst. 195; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 245; *Matter of Comm'rs*, 52 id. 137; *Potter's Dwaris on Statutes*, chap. 5; *U. S. v. New Orleans*, 98 U. S. 381; *Matter of Central Park Extension*, 16 Abb. 68; 7 Mass. 523; *McCullough v. Mayor*, 23 Wend. 458; *Lake v. Trustees*, 4 Denio, 520; *Beard v. Brooklyn*, 31 Barb. 142.) The assessment for benefits is but the manner of effecting the "payment" of the awards by those benefited by the closing of the road. (*Hammersley v. Mayor*, 56 N. Y. 536; *People v. Brooklyn*, 3 Hun, 597; *Hunt v. Utica*, 18 N. Y. 442.) If an assessment for benefit cannot be laid, as provided in the act of 1852, then there is no way of payment. (*People, ex rel. Doyle, v. Green*, 3 Hun, 755; *McCullough v. Mayor*, 23 Wend. 458.) By virtue of other laws, the assessor had authority to assess upon the property deemed benefited the loss and damage ascertained. (Laws of 1859, chap. 302, § 15 id., chap. 315; Laws of 1813, chap. 86, § 185; Laws of 1872, chap. 580, § 6.) The rule or

principle of estimating loss and damage, or assessing for benefit, may always be inquired into. The record is thereby explained and not contradicted. (*Countant v. Catlin*, 2 Sandf. Ch. 485; *People v. County Ct.*, 55 N. Y. 604; *Matter of P. E. School*, 75 id. 326; *Matter of One Hundred and Tenth St.*, 54 How. 314; *De Peyster v. Male*, MSS., DANIELS, J., 1881; 19 Wend. 679; 3 Kent's Com. 434; Laws of 1867, chap. 697, § 3; *People, ex rel. Ward, v. Asten*, 49 How. 405; 2 Dillon on Mun. Corp., § 625 [3d ed.], 620.) An assessment for benefit is an exercise of the legislative power of taxation, and such power in the legislature is omnipotent and not reviewable by the courts. (Dillon on Mun. Corp., § 586; *Matter of Church St.*, 49 Barb. 455.)

ANDREWS, Ch. J. The most serious question in this case is whether the owners of property fronting on the old Bloomingdale road in the city of New York, are entitled under the act of 1867 (Laws of 1867, chap. 697), to damages for the closing of that road. If they are not so entitled, the assessment on the petitioner's lots, for the purpose of paying the awards, is without foundation.

By the said act the commissioners of Central park were empowered to lay out anew the district between Eighth avenue and Hudson river, from Fifty-ninth to One Hundred and Fifty-fifth street. They were authorized to lay out new streets and avenues, close old roads and streets, change existing grades, etc., within that district. Their action was to be evidenced by making and filing maps which were to be conclusive both upon the corporation and the land-owners. The provision as to the closing streets, etc., was in the following words: "And all streets, avenues, roads, public squares and places and the grades thereof, heretofore laid out and established within the district mentioned in the first section of this act, which shall not be shown or retained in the maps to be filed by the commissioners as before mentioned, shall from and after the time of filing of said maps cease to be or remain public streets, avenues, roads, squares or places, and the abutting

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owners on such of said streets, avenues and roads, as have been opened or ceded, and as shall be abandoned or closed under the provisions of this act, shall become and be seized in fee-simple absolute therein, to the center line thereof, in front of his or their lands respectively," except, etc. * * * *

"All damage to any land, or to any building or other structure thereon, existing at the time of the passage of this act, on any street, avenue or road, *laid out on the map of the city of New York*, within the district specified in the first section of this act, by reason of closing such street, or altering the grade thereof, shall be ascertained and paid in the manner specified in sections three and four of an act entitled 'An act to make permanent the grades of the streets and avenues in the city of New York,' passed March 4, 1852." It will be observed that the provision in respect to the closing of all streets etc., not shown and retained on the new maps, applies to "all streets, avenues, roads, public squares and places, * * * * *heretofore laid out and established*" within the district mentioned. This covers all roads whenever and however established, while the provision in respect to the ascertainment and payment of damages to lands and buildings on the streets, etc., closed, refers to lands, etc., on "any street, avenue or road *laid out on the map of the city of New York*," within the specified district, and hence it is argued with much force on the part of the appellant, that the true construction of the act is, that the commissioners of the Central park were authorized to close any of the old roads, however established, which existed before the map of the city was made, and also any of the streets or avenues which had been laid out on that map by the commissioners appointed under the act of 1807, but that it was the intention of the legislature to allow *damages* only for the closing of the streets and avenues which had been laid out by the commissioners under the act of 1807, and which were designated on the map made by them in 1871, and generally known as the map of the city of New York, and referred to in the title of the act of 1867, as "the map or plan of the city of New York," and not to allow damages for the closing of the old roads not laid out

by the commissioners on the last named map. It is further claimed on the part of the appellant, that the Bloomingdale road is not laid out on the map of the city of New York, and consequently that the act of 1867 does not authorize the award of damages for the closing of that road. The question thus presented involves an inquiry into matters of fact, as well as of law, and it is necessary to advert to such facts bearing upon the point at issue, as are established in this case. It appears beyond controversy that the Bloomingdale road had been for more than a century before the passage of the act of 1867, an open public highway, extending through the upper part of Manhattan island. The map filed in the year 1811, by the commissioners appointed under the act of 1807, is placed before us in the form of a photographic copy, which is not disputed and both parties refer to what it exhibits. This we assume is what is commonly understood and referred to in numerous acts of the legislature, and especially in the act of 1867, as "the map of the city of New York."

On this map is delineated the projected system of streets and avenues established by the commissioners, and which, in contemplation of law, are streets and avenues laid out by such commissioners. They were thus laid out, however, as purely anticipatory, to be opened only when needed, and without regard to the then present requirements of the city, or to the topographical character of the country, or the existing roads, and only as a preparation for the great progress which the city was expected to make, but which it was supposed (as appears from the report of the commissioners) would be delayed a much longer period than has actually intervened. In making this map the commissioners were bound, of course, to delineate distinctly and by accurate surveys the streets and avenues which they had planned or laid out. These, for the most part, did not conform to physical objects, but rested on the lines the commissioners drew, and existed as streets and avenues only on the maps they made. Accordingly, in 1811 they completed the map of the upper part of the city of New York, upon which map they delineated the streets and avenues pro-

jected by them, in solid lines, without regard to existing objects on the land. But at the same time, and on the same map, they delineated the then existing roads which passed through the territory they had laid out. These existing roads they very properly designated by dotted lines instead of solid lines, because it was intended that eventually, and when the time came, these old roads should yield to the general plan they had devised; but the existing roads thus designated were, nevertheless, part of the map. In fact these dotted lines delineated the real roads which were represented upon the map. Now, if in 1867 the legislature had intended to confine the right of compensation of the owners of land on streets and roads to owners of land fronting on the new streets and avenues thus theoretically laid out by the commissioners appointed under the act of 1807, they would have said so. They did not say so, neither was there any reason why they should. First, they did not say so, because the provision for damages in the act of 1867 applies to property "*on any street, avenue or road laid out on the map of the city of New York,*" within the district, etc. This expression is not in terms confined to *streets and avenues*, which were the only things laid out by the commissioners of 1807, but also to "*roads,*" and no "road" had been laid out by those commissioners, though several were designated on their map. The plan of those commissioners consisted of the division of the part of the island then placed under their jurisdiction for these purposes, into rectangular blocks, and these roads were country roads which intersected irregularly most of those blocks. When, therefore, the legislature, after all this action, authorized compensation for the closing of "*roads,*" they must have had reference to something different from the projected blocks into which the commissioners had theoretically divided the upper part of the island. They used the very term "*roads,*" which could not be applied to the intended division into rectangular blocks. Neither was the provision applied in terms to streets, avenues and roads *laid out by the commissioners*, but to streets, avenues and roads laid out upon the map. This language was applicable

to all streets, avenues and roads shown upon the map. Is there any reason why they should have confined the right of compensation to the owners of lands fronting on the new projected streets? These old roads had been open for many years. Buildings upon them had been erected and enjoyed upon the most ancient and well-established highways of the city of New York. The closing of these old roads actually took away access to the property of owners thereon. Why should they be deprived of their frontage without compensation? Because, it is said, sixty years before, viz.: in the year 1807, in anticipation of the progress of the city of New York, beyond any limit which could then be reasonably anticipated, the legislature caused that part of the city to be mapped out, theoretically without a cent of compensation to any party concerned, and without taking any property under the right of eminent domain. But this act, it is said, contemplated the eventual abolition of the old road, for it contained a provision that if any of the projected blocks should be completed by the opening of the streets and avenues by which such block was bounded, no opening should be allowed through it, and thus the Bloomingdale road might be blocked. But that unjust piece of legislation was checked as soon as it became of any importance, and in 1838 it was withdrawn, and the power to close the Bloomingdale road was vested in the corporation of the city of New York.

In view of all these enactments we think that the act of 1867 was intended to provide compensation for the closing of streets, etc., to the owners of lands, etc., on any street, avenue, or road laid out on the map of the city of New York, within the district named, and was not confined to lands situated on the streets and avenues which had been laid out by the commissioners, but extended to any road exhibited upon their map. The provision is not, in its language, confined to the streets and avenues laid out by the commissioners, as was the case in *Re Robbins* (82 N. Y. 131), but embraced the roads shown upon their map, whether laid out by them or others. They having laid out no roads but only rectangular blocks, the legislature,

in directing compensation to be made for the closing of *roads*, must have referred to the old roads, which antedated the work of the commissioners.

In support of these views, it is proper to advert to the fact that the ascertainment of awards for the damages caused by the closing of the old roads has been repeatedly enforced by *mandamus* in the courts of the first department, and that in one of the cases (*People, ex rel. Ward, v. Asten*, 62 N. Y. 623), the decision of the Court of Common Pleas, awarding a writ of *mandamus* to the assessors to ascertain the damages of the relator for the closing of the Bloomingdale road, was affirmed by this court. On reference to the points of the appellant on file here, it appears that one of them was that the Bloomingdale road was not laid out on the map of the city of New York. This point was not discussed or specifically passed upon in the case as reported. But it was in the case and must have been overruled to arrive at the conclusion reached by the court.

We are of opinion that the court at General Term rightfully held that the owners of property situate on the Bloomingdale road were entitled to compensation for the closing of that road.

The remaining points made by the appellant cannot, in our judgment, be sustained. The act of 1852 provides for the payment of damages caused by the alteration of grades, etc., and authorizes their payment by assessment on property benefited. We think it was the intention of the legislature, by incorporating that act into the act of 1867, to make the damages, caused by the closing of Bloomingdale road, payable by assessment on the owners of lands benefited.

None of the other objections urged seem to demand special comment.

The order should be affirmed.

All concur except RAPALLO, J., taking no part, and MILLER, J., not voting.

Order affirmed.

Statement of case.

In the Matter of the Judicial Settlement of the Accounts of the Executors, etc., of MARY H. VERPLANCK, Deceased.

The will of V. contained a bequest to her executors of \$30,000 in trust "to pay over the net income of \$10,000, part of such sum" to each of three unmarried nieces of the testatrix, who were named, "so long as each remains single; upon the marriage of either to pay over to her \$1,000 of the principal of which she has enjoyed the income," and to pay over the residue of the \$10,000 to the surviving nephews and nieces of the testatrix. *Held*, that the provision did not involve an unlawful suspension of the power of alienation and was valid; that each legatee was interested only in \$10,000 of the trust fund, and as to each third the trust remained only for the life of the legatee, and when extinguished by her death or previous marriage the title to that portion of the bequest would immediately vest.

The residuary personal estate of the testatrix she gave to her nephews and nieces, the "sons and daughters" of her brother J., and of her sister E., "to be divided equally between them," and in case of the death of any such nephew or niece before the testatrix it was provided that "what would have been his or her share if living, I give to his or her issue, if any, equally. If there be none then to the survivors of my last aforesaid nephews and nieces and the issue of those deceased *per stirpes* and not *per capita*." At the time of the execution of the will and at the death of the testatrix her brother J. had two children, a son and a daughter, and her sister E. had nine children living. *Held*, that in the absence of any thing in other portions of the will showing a contrary intent, said nephews and nieces took *per capita*, not *per stirpes*.

By a codicil the testatrix gave to the children of her brother J., "as a part of their *share* of such residuary bequest," a bond and mortgage executed to the testatrix by their father. *Held*, that this was not indicative of an intention that said children should take *per stirpes*.

Also *held*, that the amount due upon the mortgage was to be deducted from the shares of the children of J.

As incident to the duty imposed upon surrogates by the Code of Civil Procedure (§§ 2473, 2481, 2743), to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid.

(Argued January 31, 1888; decided March 6, 1888.)

APPEAL from judgment of the General Term of the Supreme Court, in the second department, entered upon an order made

91	439
112	180
91	439
122	615
91	439
128	375
91	439
137	408
91	439
140	145

Statement of case.

September 13, 1882, which modified and affirmed as modified a decree of the surrogate of the county of Dutchess on settlement of the accounts of the executors of the will of Mary Hobart Verplanck, deceased. (Mem. of decision below, 27 Hun, 609.)

The material facts are stated in the opinion.

Samuel Hand for Mary H. Hare *et al.* The surrogate had no jurisdiction in this proceeding to construe the will, or to decide as to the invalidity of the trust, or establish the amount of the distributive shares. (Code, §§ 2546, 2739, 2742, 2743; *Draper v. Churchill*, 53 N. Y. 192; *Bevan v. Cooper*, 72 id. 317; *Dawson v. Jeremiah*, 3 Redf. 130; *Seaman v. Whitehead*, 78 N. Y. 308.) The trusts created by the will do not suspend the power of alienation for more than two lives then in being. (*Everett v. Everett*, 29 N. Y. 39; *Tucker v. Bishop*, 16 id. 402; *Savage v. Burnham*, 17 id. 561; *Gilman v. Reddington*, 24 id. 9; *Hoppock v. Tucker*, 57 id. 202; *Settler v. Smith*, 41 id. 328; *Manice v. Manice*, 43 id. 303; *More v. Hegeman* 72 id. 376; *Monarque v. Monarque*, 80 id. 320; *Estate of Dickie*, Daily Register of Dec. 1, 1881.) This case is clearly one where the rule "*per capita*, and not *per stirpes*," applies, and this was evidently the intention of the testatrix. (*Brown v. Lyon*, 6 N. Y. 419; *Lee v. Lee*, 39 Barb. 172; *Butler v. Stratton*, 3 Br. C. C. 367; *Farmer v. Kimball*, 46 N. H. 435; *Ferrer v. Pyne*, 81 N. Y. 281; *Lockhart v. Lockhart*, 3 Jones' Eq. [N. C.] 205; *Dowding v. Smith*, 3 Beav. 541; *Harris v. Philpot*, 5 Wend. 321; 2 Powell on Devises, by Jarman, 331; 2 Redfield on the Law of Wills, § 3, p. 72, § 5, p. 74.)

George H. Forster for Executors and J. Montgomery Hare. The power of the surrogate to appoint an auditor and referee was limited. (*Boughton v. Flint*, 74 N. Y. 477, 485; Code of Civil Procedure, §§ 2546, 2739, 2742, 2743, 2625, 2612, 2617, 2644, 2624; *Despard v. Churchill*, 53 N. Y. 192; *Bevan v. Cooper*, 72 id. 317; *Danser v. Jeremiah*, 3 Redf. 130; *Seaman v. Whitehead*, 78 N. Y. 308.) It was not necessary that a separate clause should be drawn for each trust and beneficiary.

Statement of case.

(*Tucker v. Bishop*, 16 N. Y. 402; *Savage v. Burnham*, 17 id. 561; *Gilman v. Reddington*, 24 id. 9; *Everett v. Everett*, 29 id. 39; *Hoppock v. Tucker*, 59 id. 202; *Schettler v. Smith*, 41 id. 358; *Maurice v. Maurice*, 43 id. 303; *Moore v. Hegeman*, 72 id. 376; *Monarque v. Monarque*, 80 id. 320.) From the words used in the residuary clause it is evident the testatrix intended the distribution under the residuary clause to be *per capita* and not *per stirpes*. (*Nicholls v. Nicholls*, 12 Hun, 624; 75 N. Y. 68; *Ferrer v. Pyne*, 81 id. 282; *Vincent v. Newhouse*, 83 id. 305; *Brown v. Lyon*, 6 id. 419; *Lee v. Lee*, 39 Barb. 172; *Butler v. Stratton*, 3 Br. C. C. 367; *Farmer v. Kimball*, 46 N. H. 435; *Lockhart v. Lockhart*, 3 Jones' Eq. [N. C.] 205; *Dowding v. Smith*, 3 Beav. 541; *Harris v. Philpot*, 5 Ired. 321; 2 Powell on Devises by Jarman, 331; 2 Redfield on the Law of Wills, § 3, p. 72, § 5, p. 74.)

Malcolm Campbell for John Henry Hobart, Jr. The trust of \$30,000 attempted to be created is invalid, illegal and void, by reason of its being so created and expressed as to leave the absolute ownership and power of alienation a doubtful matter, by failing to make such provision as absolutely excludes all possibility of suspension for more than two lives in being. (*Sattler v. Smith*, 41 N. Y. 328; *Everett v. Everett*, 29 id. 39.) The trust attempted to be created by the will in respect to the sum of \$30,000, for the benefit of the three unmarried nieces of the testatrix, is void by reason of the illegal suspension of absolute ownership of personal property in contravention of the provisions of the statute. (*Everett v. Everett*, 29 N. Y. 39; *Hawley v. James*, 16 Wend. 61; *Coster v. Lorillard*, 14 id. 265; *Schettler v. Smith*, 41 N. Y. 328; *Amory v. Lord*, 9 N. J. 403; *Know v. Jones*, 47 id. 389; *Thomson v. Thomson*, 55 How. Pr. 494; *Savage v. Burnham*, 17 N. Y. 561; *Dodge v. Pond*, 23 id. 69.) The fund of \$80,000 will go to the residuary legatees, and not to the next of kin. (*Kerr v. Dougherty*, 79 N. Y. 327; *Beekman v. Bonsor*, 23 id. 298.) Under the residuary clause, the son and daughter of the brother of the testatrix are entitled to an equal moiety of the

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personal estate. (*Stevenson v. Leslie*, 9 Hun, 640; *Lachland v. Dunning*, 11 B. Monr. [Ky.] 34; *Winters' Appeal*, 40 Penn. St. 111; *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 id. 505; *Huxton v. Griffin*, 18 Gratt. 574; *Alden v. Beall*, 11 Gill & J. 123; *Love v. Carter*, 2 Jones' Eq. 377; *Bool v. Mix*, 17 Wend. 119; *Balcom v. Haynes*, 96 Mass. 204; *Risk's Appeal*, 52 Penn. St. 269; *Fissel's Appeal*, 27 id. 55; *Minter's Appeal*, 40 id. 111; *Bevens v. Phefer*, 2 Jones, 436; *Holbrook v. Harrington*, 16 Gray, 102; *Lockhart v. Lockhart*, 3 Jones' Eq. 205; *Rand v. Sanger*, 115 Mass. 124; *Bossett v. Granger*, 100 id. 349; *Henderson v. Wormack*, 6 Ired. Eq. 437; *Jackson v. Hunt*, 5 Cow. 221; *Hay v. Earl of Coventry*, 3 T. R. 85; *Lyons v. Acker*, 33 Conn. 244; *Talcott v. Talcott*, 39 id. 186; *Bond's Appeal*, 31 id. 183; 45 id. 467.) The Surrogate's Court, under the provisions of the Code of Civil Procedure, is clothed with full power to adjudicate upon each and every question involved in the several appeals, and its decree upon those questions is conclusive upon the parties cited to the same extent as the determination of any court of original jurisdiction. (Code, §§ 2624, 2625, 2743; *Powell v. Deming*, 22 Hun, 235; *Bevan v. Cooper*, 72 N. Y. 317; *Chipman v. Montgomery*, 62 id. 221; *Powell v. Deming*, 21 Hun, 235; *Leggett v. Leggett*, 24 id. 333; *Rice v. Harbeson*, 63 N. Y. 493.)

E. A. Brewster for Mary C. Hobart. The surrogate correctly decided that Mary C. Hobart and John H. Hobart, Jr., are each entitled to one-fourth of the residue of the estate, after paying the debts of the deceased, the testamentary expenses and the general legacies. (*Ferrer v. Pyne*, 81 N. Y. 281; *Newell v. Nichols*, 12 Hun, 604, 624; 75 N. Y. 78.) The bond and mortgage against John H. Hobart, mentioned in the codicils, should not be deducted from the share of his children, for the reason that where different portions of a will are inconsistent, those last expressed must prevail. (*Bradstreet v. Clark*, 12 Wend. 601; *Van Vechten v. Keator*, 63 N. Y. 52.)

EARL, J. The testatrix, Mary H. Verplanck, died in March, 1879, a widow, leaving as her only next of kin and heirs at law,

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her brother, John Henry Hobart, and her sister, Elizabeth C. Hare. Mr. Hobart, at the time of his sister's death, was a widower with two children, John Henry Hobart, Jr., and Mary C. Hobart, both of full age. Mrs. Hare was a married woman with nine children, all of full age. The testatrix left a will and four codicils thereto, the provisions of which present the questions for our consideration. Among the provisions of the will is the following: "I give and bequeath to my executors the sum of \$30,000, in trust, nevertheless, to safely invest the same and to pay over the net income of \$10,000, part of such sum, to each of my unmarried nieces, Mary C. Hobart, Mary H. Hare and Elizabeth C. Hare, so long as each remains single. Upon the marriage of either, to pay over to her \$1,000 of the principal of which she has enjoyed the income, and to pay over the residue of such sum of \$10,000 to my surviving nephews and nieces, equally, including such newly-married niece, and the issue of those deceased, these last to take what would have been their parents' share if living."

This provision was held by the surrogate to involve an illegal suspension of the power of absolute ownership, and, therefore, void. The General Term of the Supreme Court, in this respect, reversed the decision of the surrogate, and held the provision to be valid; and we are of that opinion. It is one of the cardinal rules for the construction of wills that such an interpretation shall be given to the language used, if permissible, as will uphold the will rather than destroy it. In this sum of \$30,000 the legatees became tenants in common, as to their interests therein, and took distributively and not jointly. Although the whole sum is given *in solido* to the executors, and they are required to invest the whole sum, yet each of the legatees is interested in only \$10,000 thereof, and each is to receive the income of only \$10,000. As to any niece who does not marry, the trust for her remains during her life, and at her death the sum of \$10,000 will be released from the trust, and so as to each third of the \$30,000 the trust remains only for the life of each legatee. So, too, if either of the legatees should marry, the trust, as to one-third of the \$30,000,

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will then be extinguished, and that portion of the trust fund will immediately vest in those to whom it is given over. It is true that no provision is made for the disposition of the fund in case of the death of either one of the nieces unmarried. But the law provides for such a case. The purpose of the trust, as to the legatee dying, will by that event be fully accomplished. There will be no longer any purpose for which the trust could be continued, and hence it will cease, and at once the one-third will pass to those upon whom it would devolve under the provisions of the will, or by law. So that it is impossible to perceive how there is any suspension of the absolute ownership of this fund for a longer period than one life. The cases of *Everitt v. Everitt* (29 N. Y. 39), *Moore v. Hegeman* (72 id. 376), *Monarque v. Monarque* (80 id. 320) are sufficient authorities for these views, and further discussion or illustration is deemed unnecessary.

The will also contains this provision: "All the rest, residue and remainder of my personal property I give and bequeath to my said nephews and nieces, the sons and daughters of my brother, John Henry, and my sister, Elizabeth, to be divided equally between them. In case of the death of any such nephew or niece before me, what would have been his or her share, if living, I give to his or her issue, if any, equally. If there be none, then to the survivors of my last aforesaid nephews and nieces, and the issue of those deceased *per stirpes*, and not *per capita*."

Under this clause the two children of Mr. Hobart claim that the residue of the personal property is to be divided *per stirpes*, one-half to them and the other half to the nine children of Mrs. Hare; and so the surrogate held, and his decision in that respect was affirmed at the General Term. We think otherwise. Looking at the language of the residuary clause alone, according to every authority which has fallen under our observation, we would have to hold that the nephews and nieces took *per capita*. (2 Jarman on Wills, Randolph and Talbot's edition, 75; *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 id. 505; *Hoxton v. Griffith*, 18 Gratt. 574; *Bal-*

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com v. Haynes, 14 Allen, 204; *Risk's Appeal*, 52 Penn. St. 269; *Bivens v. Phifer*, 2 Jones' L. 436; *Lockhart v. Lockhart*, 3 Jones' Eq. 205.) In this case the legatees are all of equal degree of relationship to the testatrix, and it is not to be supposed that she had any greater affection for, or interest in, one than in another. So far as appears they all had equal claims upon her bounty and liberality. There is no natural or reasonable presumption that she intended to give one of her nephews and nieces, thus situated, any more than another. There is no reason to suppose that she meant to give one of the children of her brother more than four times as much as she intended to give one of the children of her sister. But it is said in many cases that in construing such a clause, as in construing any other clause of a will, notwithstanding the construction which would have to be given to it if standing alone, all parts of the will are to be considered with the view of arriving at the intention of the testator, and that if it can be seen from other portions of the will that it was his intention to dispose of his property *per stirpes* and not *per capita*, it will be so construed. In this will we do not find a single glimpse of evidence that the testatrix intended a *per stirpes* rather than a *per capita* distribution of her residuary personal estate. On the contrary, the will contains several very significant indications that she intended that all her nephews and nieces should share in the estate *per capita*. In the earlier part of her will she disposes of some silver ware to several of her husband's relatives, and then disposes of the residue in the following language: "I give and bequeath all the rest and residue of my silver and plated ware to my nephews and nieces, the children of my brother, John Henry Hobart, and my sister, Elizabeth Hare, the same to be divided among them as nearly equal as possible." Here the language used is nearly identical with that used in the residuary clause under consideration. The division of the silver ware was to be "among" the nephews and nieces "as nearly equal as possible." It cannot be doubted that she there intended a *per capita* division. She makes a special bequest of some silver to Anne H. Miller, a married

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daughter of Mrs. Hare; a gold watch and chain, and breastpin to her niece Mary Hobart Hare; a piano, diamond pin and gold chain to her niece Elizabeth C. Hare; a breastpin likeness of her father to her niece Mary C. Hobart; engraved views of St. Peter's to her nephew J. H. Hobart; and \$1,000, to her nephew Chandler Hare, who was her godson. In the clause of the will first considered, upon the marriage of either of the three nieces, for whom the trust of \$30,000 was created, one-third, after deducting the \$1,000 to be paid to the niece upon her marriage, was to be paid over to her "surviving nephews and nieces equally," thus showing her intention, in the end, to divide all but \$3,000 of the \$30,000, equally among all her nephews and nieces. In the latter part of the residuary clause, she provides, that in case of the death of any nephew or niece before her, the share that the one so dying would otherwise have received should go to his or her issue, if any, equally, thus showing that in her mind her nephews and nieces were the original stocks, and that it was their issue only that were to take by substitution in case of their death before her. Then she further provides that if any of her nephews or nieces should die without issue, before her, the share that the one so dying would have taken should go to the survivors of her "nephews and nieces and the issue of those deceased *per stirpes* and not *per capita*." Here it is clear again that the testatrix intended that the share which failed in that way, instead of being divided *per stirpes*, among the nephews and nieces, was to be divided *per capita*, and that representation was to take place only in case nephews and nieces had died leaving issue. It appears the testatrix knew the significance of the words *per stirpes* and *per capita*, and where it was necessary to apply them she knew how to apply them; and if she had intended her nephews and nieces instead of taking *per capita* should take *per stirpes*, it would have been quite natural for her to say so. In her will she made provision for her sister, by bequeathing the sum of \$10,000, in trust, to her executors, upon which she was during life to receive the income. She also devised all the real estate to her brother and sister in the

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following clause: "I give, devise and bequeath my real estate to the same persons to whom it would descend, under the laws of the State, where it is situated, in case of my death intestate."

The second and third codicils also show that the testatrix clearly understood the meaning of the words *per stirpes* and *per capita*, and how to use them, and it will be seen that in the will and in these two codicils that whenever she desires her legatees to take *per stirpes* rather than *per capita* she says so in every instance. In the second codicil she provides as follows: "I give and devise one-half of my real estate to my sister, Elizabeth C. Hare, and in case of her death, to her issue equally, *per stirpes* and not *per capita*." She then gives the remaining half of her real estate, in trust, for the benefit of her brother during life, and then provides: "Upon his death I give, devise and bequeath such real estate, or the proceeds thereof, to the issue of my said brother, equally *per stirpes* and not *per capita*; if he leave no issue, then to the issue of my said sister, Elizabeth C. Hare, equally, *per stirpes* and not *per capita*." In the third codicil she gives all the rest and residue of her old china to the nephews and nieces of her deceased husband "or to their heirs, and in case of the death of any of them without issue, to the other of said nephews and nieces, or to their heirs, the division thereof to be made equally, as nearly as may be, by my executors, according to their own judgment, between said nephews and nieces, or their heirs *per stirpes* and not *per capita*." So every glimpse we can get from this will, every indication of the intention of the testatrix, shows that, with the exception of the specific bequests which she made to her nephews and nieces, she intended they should share equally *per capita* in the property bequeathed, and there is no indication that she meant the Hobart family and Hare family to share equally as families.

She gives her sister a great deal more than she does her brother, and she gives her two unmarried nieces of the Hare family and her one unmarried niece of the Hobart family each the same interest in the trust for the \$30,000.

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Some stress is laid by counsel who represented the Hobart children, upon the clause in the second codicil, to which I will now call attention. At the time of making that codicil she held a mortgage for \$8,000, executed to her by her brother, and in reference to that she made this provision which, as it comes in question hereafter, I will here give entire. "I give and bequeath to the children of my said brother, John Henry, and their issue, as a part of their share of such residuary bequest, a bond and mortgage made to me by their father, dated July 6, 1869, for the sum of \$8,000, or any other security or obligation which I may take in the place of the same from him or any other person, and such original or substituted security shall be received by them as so much on account of their share of my said residuary bequest. In case of the death of my said nephew and niece, children of my said brother, without issue before him, I hereby direct my executors to surrender, give up to him and cancel said bond and mortgage, or any substituted obligation or security made by him or his son. In case a substituted security or obligation made by any other person is held by me in the event of the death of my said nephew and niece without issue before their father, I instruct my executors to collect and pay over to my said brother during his life the income or interest of such security or obligation, and after his death I give and bequeath the principal thereof to the issue of my said sister, Elizabeth C. Hare, equally *per stirpes* and not *per capita*." This was intended as a modification, or part of the residuary bequest contained in the will, and she here speaks of the "share" of the children of her brother; and the claim is that she thus indicates that the two children take one share. But this is not very significant. What she undoubtedly meant was that the amount of this bond and mortgage should, in the first instance, be deducted from the amount which was bequeathed to the two children of her brother, and the same language would be quite appropriate whether they took *per stirpes*, two-fourths of the residuary estate, or whether they took *per capita*, two-elevenths of it.

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This is not precisely like some of the cases to which we have been referred, a bequest to the children or the family of her brother, John Henry, and the children or family of her sister, Elizabeth, to be divided equally between them. Neither is this, like some of the other cases referred to, a bequest to her brother, John Henry, and the children of her sister, Elizabeth, to be divided equally between them, and it is not like the case of a bequest to persons related in different degrees. But here it must be noticed that the bequest is to her nephews and nieces, the sons and daughters of her brother and sister. Her brother did not have sons or daughters, and it thus appears that the testatrix had in mind as a class all the sons and all the daughters of both her brother and sister. The bequest was to her nephews and nieces, to be divided among them, and the further language describing them as the sons and daughters of her brother and sister was very probably inserted for the purpose of distinguishing these nephews and nieces from her nephews and nieces who were of the blood of her husband, for some of whom she made provision in her will. We are, therefore, of opinion that both the surrogate and the Supreme Court fell into error in holding that the residuary personal estate was bequeathed, one-half to the children of John Henry Hobart, and the other half to the children of Elizabeth Hare.

Both the surrogate and the General Term held that the amount due upon the mortgage mentioned in the clause of the second codicil above set out, which she held against her brother, should be deducted from the share of her brother's children; and in that construction we concur. We think it was the plain intention of the testatrix that the amount due her from her brother, which had upon the security of the mortgage been advanced to him, should be taken out of the shares of his children, or that it should be considered a part of their shares. It is sufficient to say that we have not been convinced, by the very careful briefs submitted to us on behalf of the Hobart children, that any injustice has been done them by this construction.

The claim was also made on the argument before us that

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the surrogate did not have jurisdiction to construe the will, or to decide upon the validity of the trust, or to establish the amount of the distributive shares. We think otherwise. Section 2472 of the Code of Civil Procedure provides, that the surrogate has jurisdiction "to direct and control the conduct, and settle the accounts of executors, administrators and testamentary trustees." "To enforce the payment of debts and legacies, the distribution of the estates of decedents, and the payment or delivery by executors, administrators and testamentary trustees, of money or other property in their possession, belonging to the estate." "To administer justice in all matters relating to the affairs of decedents according to the provisions of the statutes relating thereto." And in section 2481 it is provided, among other things, that "the surrogate may exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." The surrogate has jurisdiction over the settlement of the accounts of executors and administrators; and in section 2743 it is provided, that, "when an account is judicially settled, as prescribed in this article, and any part of the estate remains, and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights." As incident to the duty thus cast upon the surrogate, he must have jurisdiction to construe wills, so far as needful, at least to determine to whom legacies shall be paid; and this, it is believed, is a power which the surrogates of this State have always exercised. We were unanimously of the opinion that they possessed such a power under the provisions of the Revised Statutes before the Code of Civil Procedure, and it was clearly not the intention of the Code to narrow or diminish the jurisdiction of surrogates, but rather to enlarge it. Upon this subject our views were quite fully expressed in the case of *Riggs v. Cragg* (89 N. Y. 479) and the authorities bearing upon the subject were there cited.

We have, therefore, reached the conclusion that the judgment of the General Term and the decree of the surrogate should

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be modified so as to require a *per capita* division of the property, bequeathed by the residuary clause, among the nephews and nieces of the testatrix, and as thus modified they should be affirmed, without costs to either party in this court.

All concur.

Judgment accordingly.

MARY ELIZA HYNES et al., Respondents, v. KATE McDERMOTT et al., Appellants.

The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest known to the law, especially in cases involving legitimacy. Where there is enough to create a foundation for the presumption, it can be repelled only by the most cogent and satisfactory evidence.

As to whether the general rule of law that a marriage, valid or void by the *lex loci*, is valid or void everywhere, applies to the case of a domiciled citizen of this State, who, while temporarily sojourning in another country, contracts a marriage there, valid under our laws, but invalid by the law of the place, *quære*.

In an action of ejectment, wherein plaintiff M. claimed as the widow, and the other plaintiffs as children of H., a citizen of the United States, it appeared that H., who resided in the city of New York, while stopping at a hotel in London, in 1871, made the acquaintance of plaintiff M., an English subject and an employe in the hotel. A promise to marry, on his part, and an intention of marriage between them was proved; also a mutual consent to be, and to live together, as husband and wife, and a subsequent cohabitation in that apparent relation. The evidence, however, established that the cohabitation did not commence with a marriage, valid by the English law, and there was no evidence of a subsequent marriage, in accordance with that law. In June, 1871, the parties went to Paris, where they lived together as husband and wife, and he introduced her to acquaintances as his wife. They returned to London, where they lived together until his death which occurred in 1874, and where the children, who are plaintiffs, were born. H. addressed M. as Mrs. H., and so addressed letters to her, and their life in England was the ordinary household life of persons lawfully married. *Held*, that while the evidence was insufficient to show, or to raise a presumption of a marriage, in accordance with the requirements of the English law, in the absence of proof as to the marriage-law of France it

91	451
114	118
91	451
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120	515

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might be assumed that the requisites to constitute a marriage in that country are the same as our own, and so that the mutual assent of the parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage; and that the evidence raised a presumption and authorized a finding that the parties interchanged matrimonial consents in France.

Defendants, to meet this presumption, gave evidence to the effect that after the return of the parties to England, M., in business transactions, used the name she bore before her acquaintance with H. M., as a witness, gave explanation as to the reason for using such name in certain of the transactions; as to others she denied such use. *Held*, that as the facts sworn to by defendant's witnesses were either contradicted or did not conclusively repel the presumption of marriage, this court was precluded from reviewing the question (Code of Civil Procedure, § 1837), and the finding of the jury was conclusive.

(Argued January 18, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made April 3, 1882, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action of ejectment to recover possession of certain lands in the city of New York.

The material facts are stated in the opinion.

John Hallock Drake for appellants. The validity of a marriage contract is to be determined by the laws of the country where it is made. The *lex loci contractus* determines the status of the parties. (Bishop on Marriage and Divorce, § 335; Story's Conflict of Law, §§ 79-81; *Dalrimple v. Dalrimple*, 2 Hagg. Con. 54; *Schrimshire v. Schrimshire*, id. 395; *Connelly v. Connelly*, 2 Eng. L. & Eq. 570; *Herbert v. Herbert*, 2 Hagg. Con. 271; *Stevenson v. Greeley*, 17 B. Monr. [Ky.] 193; *Midway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 18 id. 506; *Putnam v. Putnam*, 25 id. 433; *In Matter of Webb*, 1 Tuck. 373; *Van Voorhis v. Brintnall et al.*, 86 N. Y. 18; *Thorp v. Thorp*, N. Y. Ct. of App., Daily Reg., Jan. 8, 1883; *Davis v. Davis*, 1 Abb. N. O. 140.) It having been shown that the intercourse was, in its origin, illicit, the pre-

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sumption is that it so continued, and the onus of proof is on the plaintiffs. (*Cunningham v. Cunningham*, 2 Dow. 482; *Lapsley v. Grierson*, 1 H. of L. Cas. [C. & F.] 498; *Rose v. Clark*, 8 Paige, 573; *Clayton v. Wardell*, 4 N. Y. 236; *Brinkley v. Brinkley*, 50 id. 198; *Badger v. Badger*, 88 id. 546.) Reputation of marriage to be effective must not be divided; it must be general, and consistent with matrimonial cohabitation. (*Clayton v. Wardell*, 4 Comst. 230; *Cunningham v. Cunningham*, 2 Dow. 482; *Brinkley v. Brinkley*, 50 N. Y. 198; *Dysart Peerage Case*, 6 Eng. L. R., H. of L. 514; *Badger v. Badger*, 88 id. 548.) The court erred in charging that, if the jury is satisfied that in France there was cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, they are at liberty to infer that these two people, being at liberty in France to contract a valid marriage, did so. (*Fenton v. Reed*, 4 Johns. 52; *Jackson v. Claw*, 18 id. 346; *Rose v. Clark*, 8 Paige, 574; *Wilkinson v. Payne*, 4 Term R. 468; *Stewart v. Robertson*, 2 Scotch and Divorce App. Cas. 532; *Lapsley v. Grierson*, 1 H. of L. Cas. [C. & F.] 498.)

Joseph H. Choate for respondents. Under section 1337 of the Code of Civil Procedure there can be no review in this court of the questions of fact depending upon conflicting evidence. (*In re Ross*, 87 N. Y. 514; *Davis v. Clack*, id. 623; *Marx v. McGlynn*, 88 id. 369.) The law presumes every thing in favor of the legitimacy of children, and it is a very powerful and overwhelming presumption. (*Fenton v. Reed*, 4 Johns. 52; *Breadalbane Case*, Eng. L. R. [Scotch and Appeal Cases] 182, 192; *Jackson v. Claw*, 18 Johns. Ch. 346; *Rose v. Clark*, 8 Paige, 574; *Starr v. Peck*, 1 Hill, 270; *In re Taylor*, 9 Paige, 611; *Durand v. Durand*, 2 Sweeney, 315; *Caujolle v. Ferrie*, 23 N. Y. 90; *Betsinger v. Chapman*, 88 id. 487; *Tyle v. Ellwood*, L. R., 19 Eq. Cas. 98; *De Thosen v. The Attorney-General*, L. R., 1 App. Cas. 686, 694; *Piers v. Piers*, 2 H. L. 31; 82 N. Y. 47; *Badger v. Badger*, 88 id. 554; *Cunningham v. Cunningham*, 2 Dow. P. C. 482;

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Clayton v. Wardwell, 4 Comst. 227; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Dysart's Peerage Case*, L. R., 5 App. Cas. ; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Wilkinson v. Payne*, 4 Term R. 468; *Rex v. Fourney*, 2 B. & Ald. 468.) The presumption in favor of legitimacy is so strong and absolute, that in order to defeat it, the party claiming illegitimacy must negative every reasonable possibility. (*Piers v. Piers*, 2 H. L. Cas. 331; *Oaujolle v. Ferris*, 23 N. Y. 109.) The marriage acts of Great Britain, declaring all marriages void unless solemnized in the places and according to the formal observances prescribed by those acts, do not apply to an American citizen whose domicile and residence is in New York, and who marries while temporarily sojourning in England, intending not to remain there, but to remove with his wife to America as his permanent home, and if in such a case the marriage is valid according to the law of New York, it must be sustained by our courts. (*Ruding v. Smith*, 2 Hagg. Const. 390; *Harford v. Morris*, id. 423, 486, note; *Middleton v. Janvrin*, id. 437; *Latour v. Teesdale*, 8 Taunt. 830; *Harfords v. Higgins*, 2 Hagg. Const. 432; *Harvie v. Farnie*, L. R., 5 P. D. 153; L. R., 6 P. D. 25, 46, 48, 51; U. S. Rev. Stat. 1993, 1994; *Killby v. Owen*, 7 Wall. 496; *Burton v. Burton*, 1 Keyes, 374; *Warender v. Same*, 9 Bligh, 103-4; Story's Conf. of Law, 846; Wheat. Conf. of Law, § 170; *Simonton v. Wallace*, 2 Swabey & Tr. 67; Friedburg, 127, 150; Die Herrschaft der Gesetze, etc., p. 79; Wharton's Law of Evid. 100, § 83; *Hutchins v. Kimmel*, 31 Mich. 133; Wharton on Conf. of Law, § 180; *Brower v. Brower*, 1 Abb. App. 214; *Losing v. Thorndyke*, 5 Allen [Mass.], 257; *Davis v. Davis*, 1 Abb. N. C. 140.)

ANDREWS, J. The adult plaintiff, Mary Eliza Hynes, is the alleged widow of William Rose Hynes, who died in London, England, June 27, 1874. The infant plaintiffs William Rose Hynes and Andrew Hynes, are the children of William Rose Hynes, Sr., by Mary Eliza Hynes, and were born in London, the one Dec. 18, 1871, and the other May 10, 1873. The father

of the infant plaintiffs died intestate, seized of the premises in controversy, and the right of the plaintiffs to recover depends upon the question of the marriage of their mother with their father, William Rose Hynes. This issue was found by the jury in favor of the plaintiffs. There was no proof of a formal ceremonial marriage between the parties, and the sole question upon the merits is whether upon the whole facts appearing on the record, the jury were authorized to find that a marriage between the parents of the infant plaintiffs, was consummated prior to their birth.

William R. Hynes, the father, was a native born citizen of the United States, and prior to 1871, was a bachelor, residing in the city of New York. He had retired from active business. He possessed a quite large property in this country, mainly real estate. He was accustomed to make annual visits abroad, and in the spring of 1871, while stopping at the Langham Hotel, London, made the acquaintance of the adult plaintiff, a young woman employed in the hotel in the capacity of still-room maid, having charge of the linen, and the supervision of the female servants of the house. She was an English subject, the widow of Charles Saunders, who died in 1869, and had always resided in England. The plaintiffs, to establish the marriage between Mr. Hynes and Mrs. Saunders, proved an intention of marriage between the parties, and subsequent cohabitation in the apparent relation of man and wife, from about the 1st of June, 1871, to the death of Mr. Hynes, which occurred in June, 1874. It was shown that in the spring of 1871, at the Langham Hotel, Mrs. Saunders introduced Mr. Hynes to one of her brothers as the person she was about to marry. In June of that year, Mr. Hynes and the plaintiff Mrs. Hynes, were in Paris. A Mr. Fargo, of San Francisco, an acquaintance of Mr. Hynes, saw them together there at a hotel dinner table, and was introduced by Mr. Hynes, to the adult plaintiff, as Mrs. Hynes, and he afterward frequently saw them at their temporary residence in Place Madeleine. How long they remained in Paris, does not appear. They were in London at the birth of their eldest child, and were then residing in Glou-

cester street. In the spring of 1872, they reinvoved to a house in Leverton street, where they remained until the spring of 1873, when they removed to a house known as Victoria Villa, in Kentishtown, where their second child was born, and where they continued to reside until Mr. Hynes' death. Mr. Fargo testified that he was a constant visitor of Mr. Hynes, both at the Place Madeleine and at Victoria Villa; that Mr. Hynes was in the habit of addressing the adult plaintiff in his presence, as Mrs. Hynes, or Lizzie, and that he had frequently seen Mr. Hynes address letters to her as Mrs. Hynes. Their life in England, as detailed by the relatives of Mrs. Hynes, and other witnesses for the plaintiffs, was the ordinary household and family life of persons lawfully married, having children, the fruit of lawful wedlock. He treated Mrs. Hynes with apparent respect and affection, and was fond of his children. He spoke of Mrs. Hynes in the presence of others, as his wife. The relatives of his wife visited him on the footing of relatives by marriage. He introduced Mrs. Hynes' brother, as his brother-in-law. When he applied for a lease of Victoria Villa, he stated that he required a house for himself, his wife and family. In June, 1874, he was thrown from a carriage in which he was riding with Mrs. Hynes, and received the injury of which he died. On being taken into a public house, he asked if his wife was much hurt, and requested that his children should be sent for.

These circumstances, cohabitation, family life, declarations of the parties, repute of marriage, while they do not constitute marriage, evidence it, because they are the circumstances which usually attend and characterize that relation, and the cohabitation having commenced in England, the presumption is that the marriage was contracted in accordance with the forms and requirements of the English law. The defendants sought to overthrow the presumption of marriage in England, arising from habit and repute, by showing the circumstances under which the cohabitation commenced. It appears that Mrs. Saunders in May, 1871, had left the Langham Hotel, and was living in lodgings at 169 Cleveland street, London. It was proved that on the night of Derby day, in that month, Mr. Hynes visited her, and

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desired to remain with her, and she refused to consent without marriage, and complained that he had not kept a promise of marriage. He said he did not believe in the marriage ceremony or the mumbling of priests. He thereupon, in the presence of witnesses, took a ring from his pocket and gave it to her, saying that if she would wear the ring and be true to him, he would consider her his wife as much as if they had been married in church. She accepted the ring on these conditions, and he remained there that night, and from that time until his death, openly lived and cohabited with her. At the time of this occurrence, Mrs. Saunders was pregnant of the eldest child, William Rose, born in the following December. This evidence seems conclusively to establish the commencement of an illicit intercourse between Mr. Hynes and Mrs. Saunders, prior to May, 1871, and also that the cohabitation of the parties did not commence with a marriage valid by the English law. The British Marriage Act prescribes that marriages shall be publicly celebrated, and expressly annuls all marriages not solemnized in church, or under a license before a magistrate. Nor is there any evidence of a subsequent marriage in England in accordance with the local law. There seems to be no ground for such a presumption in view of the facts above stated, and of the further fact which was found, that by the British statute, all marriages in England are required to be registered and that no registry of a marriage between these parties could be found.

If the issue of marriage, depended upon evidence that there was a marriage, according to the forms of the English law, the plaintiffs could not recover. The presumption of such a marriage, raised in the first instance, by proof of habit and repute, was rebutted by the evidence on the part of the defendants. But it is claimed that what took place in Cleveland street constituted a valid marriage, according to the law of New York, and while it is admitted that by the general rule of law, a marriage valid or void by the *lex loci*, is valid or void everywhere, it is insisted that this rule does not apply to the case of a domiciled citizen of this State, who, while temporarily

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sojourning in another country, contracts a marriage there, valid according to our law, although invalid by the law of the place, by reason of non-compliance with the forms of celebration prescribed by the local law, and especially that the law of the domicile will control as to legitimacy, and rights of property depending upon marriage. This question if necessary to be decided, would require careful consideration. If, in the absence of any statute regulating the subject, the exception to the general rule exists, as is claimed, where both the parties to the contract, at the time of the marriage, are domiciled citizens of this State, does it extend to a case where one of them was then a subject of, and domiciled in the country where the contract was made, and by the laws of which, the marriage was invalid.

But we deem it necessary to decide this question in this case. ^{was} Mr. and Mrs. Hynes, as has been stated, were in Paris during the summer of 1871. There was no proof given of the marriage law of France, and it was held on the former appeal in this case (82 N. Y. 41; 37 Am. Rep. 538) that in the absence of proof to the contrary, it would be assumed that the requisites to constitute marriage are the same in another country as in our own, and it may be safely assumed as a fact, that in France, the mutual consent of parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage, since if it was otherwise, it could readily have been shown. The jury, in addition to their general verdict, made a special finding that the parties, while in France, entered into an agreement *in presenti* to take each other as man and wife, and thenceforward cohabited together as such in France and England. There is no direct evidence of the interchange of consents during their stay in Paris. There was evidence that they lived together there in the apparent relation of marriage, and assuming that what occurred between them in Cleveland street, did not constitute a valid marriage by the law of this State, for the reason that the law of England can only be resorted to, to determine the effect of that transaction, we are, nevertheless, of opinion that the jury were

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authorized to find that in France the requisite consents were interchanged, and that the parties, then and there, became husband and wife.

The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence. In *Morris v. Davies* (5 Cl. & Fin. 163) Lord LYNDEHURST, speaking of this presumption, says: "The presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." In *Piers v. Piers* (2 H. L. Cas. 331) Lord CAMPBELL said, that the presumption could be negatived only "by disproving every reasonable possibility," and Lord BROUGHAM, in the same case, approved the general doctrine stated by Lord LYNDEHURST, in *Morris v. Davies*, and said that the presumption could be dispelled only by evidence which was "clear, distinct and satisfactory." The presumption has been acted upon in several cases in our own courts, and in some recent cases in England, which have a very direct bearing in support of the finding of the jury in this case. The earliest case in our courts is *Fenton v. Reed* (4 Johns. 51). In that case the question was whether the plaintiff was the widow of one Reed. In the year 1785, she was the lawful wife of John Guest. Sometime in that year Guest left the State for foreign parts, and continued absent until sometime in the year 1794, and it was reported and generally believed that he had died abroad. The plaintiff in 1792 married Reed. In that year, and subsequent to the marriage, Guest returned to this State, and continued to reside herein until June, 1800, when he died. He did not object to the connection between the plaintiff and Reed, and said he had no claim upon her, and never interfered to disturb

their relations. After the death of Guest the plaintiff continued to cohabit with Reed until his death in 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and Reed subsequent to the death of Guest. Upon these facts the court below decided in favor of the plaintiff. The court on appeal affirmed the judgment, saying "there existed strong circumstances from which a marriage subsequent to the death of Guest might be presumed. The parties cohabited together as husband and wife, and under the reputation and understanding that they were such from 1800 to 1806, when Reed died, and the wife during that time sustained a good character in society. A jury would have been warranted under the circumstances of the case, to have inferred an actual marriage, and the court below had sufficient ground to draw that conclusion; and as they have drawn it, and their decision being a substitute for a verdict, we will not disturb it." It will be noticed that the parties to the marriage in *Fenton v. Reed* came together under a void contract of marriage, but supposing, as may be assumed, that the former husband was dead; but they continued their connection after the return of the first husband, and from that time until the death of Reed, their connection was known to be meretricious; but this fact was not considered sufficient to repel the presumption of a subsequent marriage. The same presumption was applied under circumstances very similar in *Rose v. Clark* (8 Paige, 574); and in *Caujolle v. Ferris* (23 N.Y. 90), a marriage was presumed to sustain legitimacy, although it appeared that the connection of the parties commenced in an illicit intercourse. The *Breadalbane Case* (Eng. L. R., 1 Scotch and Divorce Appeals, 182), decided by the House of Lords, upon great consideration, is an authority of great weight in support of the finding of the jury in this case. The question in that case was one of legitimacy, depending upon the fact whether James Campbell, who in 1781, eloped with the wife of one Ludlow, and with whom Campbell cohabited until his death in 1806, was married to her after the

death of her first husband in 1784, and prior to the birth of their eldest son in 1788. A marriage was celebrated between them in Scotland in 1782, which was clearly bigamous. By the law of Scotland marriage may be contracted by the consent of the parties without any formal celebration or the presence of witnesses. There was no direct evidence of the interchange of consents between James Campbell and his alleged wife after the death of her first husband, but they were in Scotland after that time, and before the birth of their eldest son, and they lived together as man and wife, and were reputed to be married. It was urged that the intercourse between the parties having been illicit in its origin, and the cohabitation having continued after the death of the first husband, without any marked change in its character, there could be no presumption of marriage, and, also, that the matrimonial consent must be referred to the commencement of the cohabitation, which would be insufficient, as the first husband was then living. The court, however, decided that there was a presumption of marriage between the parties subsequent to the death of Ludlow, Lord WESTBURY saying: "You must infer the consent to have been given at the first moment when you find the parties able to enter into the contract." *De Thoren v. The Attorney-General* (L. R., 1 App. Cas. 686) is also a very strong case of the application of the presumption of marriage. It appeared that on the 1st of July, 1862, William Ellis Wall obtained a decree *nisi* dissolving his then marriage, but which did not become final until the expiration of the period allowed for an appeal, during which time he could not legally marry again. In ignorance of this temporary disability he went through a ceremony of marriage at Glasgow with Miss Sarah Ogg on the 16th of July, 1862, before the time for appealing from the decree had expired, both parties believing that there was no obstacle to their marriage. They lived together as husband and wife and had children of the union. There was no evidence of any interchange of consents between them after the marriage in 1862, and neither had any suspicion prior to the husband's death of the invalidity of that marriage. The court, however, held that the parties must be presumed to have

interchanged consents, as soon as the impediment to their marriage was removed. It will be observed that in the *Breadalbane Case* this presumption was indulged although the ceremonial marriage was known by the parties to be bigamous, and in *De Thoren's Case*, although the parties regarded themselves as lawfully married, and the invalidity of the marriage was never known to them during the husband's life.

The presumption that Mr. and Mrs. Hynes interchanged the matrimonial consents in France is, we think, supported by the cases referred to. This presumption, moreover, giving credence to the testimony for the plaintiffs, is not inconsistent with the probabilities. It is true that their first intercourse was illicit, but nevertheless it was, as may be inferred under a promise of marriage on the part of Mr. Hynes. The transaction in Cleveland street, if the apparent purpose was the real one, was intended by the parties as an assumption by them at that time of the relation of husband and wife. The subsequent conduct of Mr. Hynes is inconsistent with the supposition that it was a mere device on his part to obtain the temporary gratification of his passions. It is quite certain, in view of the situation of Mrs. Hynes, that she was anxious to have the marriage consummated. She was presumed to know that the transaction did not constitute a valid marriage by English law, and the same presumption applies to him, although in his case it was much less likely to represent the actual fact. But Mr. Hynes was not presumed to know that a marriage thus consummated would not be a valid marriage by the law of his domicile. Whether it was valid by that law is one of the questions elaborately argued before us in this case, and it is not settled by any statute or authoritative decision in our courts. The parties while in France might very naturally desire to remove any doubt as to the validity of their marriage, and this could be done by renewing there their consent to be husband and wife. That they did so is the inference of the law, and, as has been said, is not an unreasonable supposition from the circumstances.

The defendants sought to countervail this presumption, by

proof of acts and conduct, especially on the part of Mrs. Hynes after her return to England, inconsistent therewith and the evidence certainly raises grave doubts whether the parties ever consummated a marriage, or regarded themselves as man and wife. It was shown that in 1878, Mrs. Hynes opened an account at a bank in London in the name of Elizabeth Saunders, signing that name in books of the bank, which account was continued in that name until the death of Mr. Hynes, when she had it changed to the name of Mrs. Hynes. In this account sums were credited, which appear to have been obtained on checks of Mr. Hynes, payable to "E. Saunders," and many checks were drawn by her against the account, in that name. Mrs. Hynes attempted to explain the reason for the account being kept in this way, but the explanation seems quite unsatisfactory. The defendants also produced a lease of the house in Leverton street, occupied by Mr. and Mrs. Hynes in 1872, dated February 9, 1872, to Elizabeth Saunders, as lessee, purporting to be signed by her in that name. The lease was procured by a detective from the lessors in London, and he testified that the signature was in the same handwriting as the signature in the bank book. But Mrs. Hynes denied that it was her signature, and testified that she never saw the lease till the trial. The defendants also produced and proved photographic copies from the official registry of births in London, in the district where the plaintiff Mrs. Hynes resided, and where the infant children were born, made as required by the English statute, within forty days after their births respectively, which correctly stated the date of their birth, their names, the place where Mrs. Hynes resided when the children were born, but which in one case gave the name of the father as "William Saunders," and the mother as "Mary Saunders, formerly Millis," and in the other case, the father's name as "William Saunders," and the mother's name as "Elizabeth Saunders, formerly Millis." The name of the informant purports to be signed in the register. In one case it is "Mary Saunders," and in the other "E. Saunders." The detective testified that these signatures were in the handwriting of Mrs. Hynes, but she testified that they were not her

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signatures, and that she neither furnished any information to the register, nor had any knowledge prior to the trial, of the existence of these records. The jury accepted the explanation of Mrs. Hynes in respect to the bank account as satisfactory, and also her denial in respect to the lease and the register. We are not called upon to say whether the finding of the jury of a marriage, is satisfactory to us. There was a presumption of marriage raised by the testimony for the plaintiff. It was sought to be repelled by circumstances. These circumstances were either contradicted or did not conclusively repel the presumption, and this court is precluded by statute from reviewing a question of fact arising upon conflicting evidence in a case like this. (Code, § 1337.)

There are no exceptions which would justify a reversal of the judgment. The exception to the refusal of the court to charge that the validity of the arrangement shown to have taken place in England, must be determined solely by the law of England, is not available for two reasons; *first*, that the case was finally left in the charge on the presumption of a marriage, independent of the transaction in Cleveland street; and *second*, the special finding of the jury that the parties interchanged consents in France, renders the point as to the effect of that transaction, immaterial. The other exceptions are considered in the opinion of the General Term, and it is sufficient to say that we concur in the conclusion of the learned court in respect to them.

The judgment should be affirmed.

All concur.

Judgment affirmed.

MARY ANN CAMPBELL, Appellant, v. CHARLES L. BEAUMONT,
Respondent.

The will of B. disposed of his property as follows: "I leave to my beloved wife, Mary Ann, all my property * * * to be enjoyed by her, for

91	464
114	438
91	464
120	379
91	464
125	433
91	464
140	128
91	464
142	439

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her sole use and benefit, and in case of her decease, the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son Charles, * * * requesting him, at the same time, that he will use well and not wastefully squander the little property I have gained by long years of toil." Charles was a son of the wife by a former husband. In an action for a construction of the will, *held*, that the widow took an absolute title, and therefore the power to dispose of the whole estate, unaffected by the provision as to her son.

It seems that if a limitation was intended, it is inconsistent with the absolute gift to the wife and is void.

Terry v. Wiggins (47 N. Y. 512), distinguished.

Smith v. Bell (6 Peters, 68), distinguished and questioned.

(Argued January 31, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 6, 1882, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a construction of the will of John P. Beaumont, deceased.

The clause of the will in question is as follows: "I leave to my beloved wife, Mary Ann, all my property, of whatever kind, including eight bonds of one thousand dollars each, and certificate of twenty shares of the stock of the North River Bank in New York, contained in a tin box deposited by me in said bank, together with the silverware contained therein. Also all furniture, pictures, books and whatsoever else is contained in the premises occupied by me at No. 518 Broadway, as well as all other property of whatever kind I may die possessed, to be enjoyed by her for her sole use and benefit, and in case of her decease the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son, Charles Lewis Beaumont, requesting him at the same time that he will use well and not wastefully squander the little property that I have gained by long years of toil."

The testator died in July, 1876, leaving him surviving Mary Ann Beaumont, his widow, who is now Mary Ann Campbell, the plaintiff herein, and also Charles Lewis Beaumont, named

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in the will, who was not the son of the testator, but of his wife by a former husband.

Freeman J. Fithian for appellant. The gift by the testator of all his property to the plaintiff, with absolute power of disposition for her sole use and benefit without qualification, created a fee in the real estate unaided by the Revised Statutes. (1 R. S. 733, § 85; *Wm. H. B. Totten, respondent, v. Abraham S. Sprague, appellant*, 15 N. Y. W'kly Dig. 203.) The defendant has no interest whatever in the property in question. (*Cohen v. Cohen*, 3 Redf. 48; *Smith v. Van Ostrand*, 64 N. Y. 284; *Pinckney v. Pinckney*, 1 Brad. 271; *Helmer and Wife v. Shoemaker*, 22 Wend. 137; *Jackson et al. v. Delaney and Russell*, 13 Johns. 537; *Jackson et al. v. Robbins*, 15 id. 168; affirmed, 16 id. 537; *Wright v. Miller*, 4 Seld. 25; *McDonald v. Walgrove*, 1 Sandf. Ch. 274; *Ide v. Ide*, 5 Mass. 500; *Ross v. Ross*, 1 Jacobs & Walker's Ch. 153; *Bradley v. Pschizotto*, 3 Ves. 323; *Flanders v. Clark*, 1 Ves. Sr. 9; *Atty.-Genl. v. Hall*, Fitzgibbons, 314, 321; 1 Roper on Legacies, 624; *McLean et al., Executors of Walgrove, v. McDonald*, 2 Barb. S. C. 534; *Patterson v. Ellis*, 11 Wend. 259.) There are no words in the will which cut down the gift to the plaintiff to the enjoyment of the principal for life. (*Clark v. Leupp*, 88 N. Y. 228; *Lambs v. Eames*, L. R., 10 Eq. Cas. 267.) Mrs. Campbell is vested with an absolute and unconditional power of disposition over the whole of the property devised, and as against her in her life-time or any grantee of hers, this remainder is void. (*Smith v. Van Ostrand*, 64 N. Y. 278-284-285; *Helmore and Wife v. Shoemaker*, 22 Wend. 137; *Ferry v. Wiggins*, 47 N. Y. 512.)

George A. Baker for respondent. The intention of the testator, so far as it is consistent with established rules of law, must govern the interpretation of the will. (*Smith v. Bell*, 6 Peters [U. S.], 68; *Pond v. Bergh*, 10 Paige, 140; *Terry v. Wiggins*, 47 N. Y. 512; *Colt v. Heard*, 4 Weekly Dig. 197.) The whole must be considered, and the court must, if possible,

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give it a construction that will sustain the whole and every part of it. (*Smith v. Bell*, 6 Peters, 68; *Kane v. Astor's Exrs.*, 5 Sandf. 533; *Sweet v. Chase*, 2 Comst. 73.) Where a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make. Whatever power of disposal the words convey is limited by the estate with which they are connected. (*Brant v. Virginia Coal & Iron Co.*, U. S. Sup. Ct., Oct., 1876, New York Weekly Dig. 20.)

DANFORTH, J. This action was brought to obtain a construction of the will of John P. Beaumont, the question being, whether the plaintiff, his widow, took a fee in the real, and became the absolute owner of the personal estate, or an estate for life only. The difference between the learned courts below shows that the point presents a difficulty, but we are of opinion that the conclusion of the Special Term (expressed by VAN VORST, J.), upon the first trial, should be sustained. To depart from it words must be supplied to cut down an apparent absolute gift, and this cannot be done unless the language actually used by the testator requires it. We are not to conjecture what he meant, but ascertain the meaning of his words. (*Abbott v. Middleton*, 7 H. of L. Cas. 68.) "I leave," says the testator, "to my beloved wife, Mary Ann, all my property * * * to be enjoyed by her for her sole use and benefit," thus vesting the whole in the wife — the fee of the real estate, and the use and power of disposition of both real and personal estate. In what other manner can the words be satisfied? The testator "leaves," that is, gives to his wife — withholds nothing — and then adds, "to be enjoyed by her for her sole use and benefit." There are no words of qualification, and giving to those used their exact sense, she is put in the place of the testator as to title, and all rights and privileges belonging to it. It is suggested by the respondent that the testator's object was to secure to her an estate free from the marital rights of any future husband. This requires not only a great modification in the general meaning of the words, but

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imputes to the testator the exercise of unnecessary caution, for at the time of the execution of the will the statutes relating to the rights of married women fully protected her in the use of property so acquired. But the testator had in mind also, not his own son, but the son of his wife by a former husband, and after the provision referred to says, "and in case of her" (his wife's) "decease, the same, or such portion as may remain thereof, it is my will shall be received and enjoyed by her son, Charles Lewis Beaumont, requesting him at the same time that he will use well, and not wastefully squander the little property I have gained by long years of toil." This language is resorted to by the defendant as restraining the bequest to the plaintiff. It seems insufficient to limit the wife's estate or interest, and rather to have been intended to express the natural anticipation of the testator, that this property, or some of it, would, as matter of course, go from the mother to her child, and his acquiescence in such devolution, coupled with a hope that what he had painfully acquired should not be wasted. But if more was intended, then in view of the absolute gift to the wife in the preceding sentence, the bequest to her son is void. (*Ross v. Ross*, 1 Jac. & W. 153; *The Att'y-Gen'l v. Hall*, Fitz-G. 314; *Bull v. Kingston*, 1 Meriv. 314; *Patterson v. Ellis*, 11 Wend. 260; *Tyson v. Blake*, 22 N. Y. 558; *Norris v. Beyea*, 13 id. 273; *Smith v. Van Ostrand*, 64 id. 278.) In all these cases it was in substance held that when the property is expressly or by necessary implication to be spent by the primary legatee at his pleasure, a further limitation is clearly hostile to the nature and intention of the gift. *Terry v. Wiggins* (47 N. Y. 512), cited by the respondent, is not necessarily adverse to this view; there reliance was placed upon the peculiar language of the will, and a devise "for personal use and maintenance" was held to terminate at the death of the devisee. *Smith v. Bell* (6 Peters, 68), also relied upon by him, is not easily reconcilable with the cases cited *supra*. But it is to be noticed in that case no counsel was heard in behalf of the party against whom the decision was made, and the remainder was the only substantial provision made by the will for the tes-

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tator's only child. It was thought the whole will showed a clear intention to limit the interest of the first taker to his life. It seems otherwise in the case before us. The gift appears absolute and entire in its terms; no child of the testator was to be provided for, and it better accords with decisions in this State to hold that, if a limitation over was attempted, it is repugnant and void (*Jackson v. Bull*, 10 Johns. 19), and with still earlier cases which declare that where "a particular estate is devised, we cannot, by any subsequent clause, collect a contrary intent by implication." (*Popham v. Banfield*, 1 Salk. 236.) If done in this case, it must be by construction, for the clause in favor of the wife stands by itself; the property is bestowed upon her for her own use and benefit, and we cannot suppose the testator intended to subject his wife to the responsibility of a trustee for a remainderman, and thus make her liable to exhibit an inventory, if not to give security. (*Westcott v. Cady*, 5 Johns. Ch. 349.) This would be inconsistent with the implied power to dispose of, and the express power to use the property at pleasure and for her sole benefit. All agree that the general rule requires the intention of the testator to be regarded, but it is more difficult to get aid from adjudged cases in the construction of one in hand. Words and clauses differ, and courts do not agree in their interpretation, but we think the general current of authority is with the plaintiff, and requires us to hold in this case that the wife acquired an absolute interest in the estate, and, therefore, the power to dispose of the whole at her pleasure, unaffected by the subsequent provisions of the will.

The judgment of the General and Special Terms should therefore, be reversed, and the plaintiff have judgment, as prayed for by her complaint. with costs.

All concur.

Judgment accordingly.

ELIZABETH V. B. SMITH, as Executrix, etc., et al., Respondents,
v. EDWARD ROBERTS et al., Appellants.

While a merger at law follows upon the union of a greater and a lesser estate in the same ownership, it does not follow in equity, and estates will be kept separate where such is the intention of the parties and justice requires it.

That intention may be gathered, not only from the acts and declarations of the party, but from a view of the situation as affecting his interests, at least prior to the presence of some right in a third person.

Until such right intervenes the intention as to merger remains subject to change, and whatever occurs between the parties interested, tending to show the intention, is, when the question of merger is in issue, admissible as part of the *res gesta*.

A purchase by and conveyance to a mortgagee of an undivided part of the mortgaged premises, where it does not appear that there was a payment or merger of the mortgage, or any portion thereof, operates as a release of the portion conveyed from the lien of the mortgage, leaving it to rest solely upon the portion unconveyed.

A subsequent mortgagee of the part unconveyed, where the prior mortgage is recorded, is chargeable with notice and takes subject to the lien thereof.

Where such subsequent mortgagee foreclosed his mortgage, making the prior mortgagee a party defendant, but without setting forth or alluding to the prior mortgage, and obtained the ordinary judgment of foreclosure and sale, and where by the terms of sale the premises were sold free and clear of incumbrance, *held*, that the judgment did not constitute a bar to an action to foreclose the prior mortgage, although the mortgagee knew of the judgment and made no effort to have the same modified or set aside, it not appearing that he was present at or was cognizant of the manner in which the sale was made.

(Argued February 1, 1883; decided March 6, 1883)

APPEAL by defendant Edward Roberts from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 27, 1882, which affirmed a judgment in favor of plaintiffs, entered upon decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Jacob F. Miller for appellants. Any conversation between Mr. Benjamin and Mr. Smith, not communicated to Mr.

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Roberts, should not be held to affect the latter. (*Footo v. Beecher*, 78 N. Y. 155.) By the two deeds from Benjamin and Smith of an undivided one-fourth and an undivided one-half of the mortgaged premises the mortgage debt became merged. (*Shaw v. Ellis*, 6 Johns. Ch. 393; *James v. Johnson*, id. 417; *James v. Morey*, 2 Cow. 303; *Spencer v. Cyrault*, 10 N. Y. 202; *Bascom v. Smith*, 38 id. 320.) The act of Mr. Smith in receiving the deed containing a clause that the premises were free and clear constituted an estoppel *in pais*. (*Plumb v. Cattaraugus Co. Mutual Ins. Co.*, 18 N. Y. 394; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Storrs v. Baker*, 6 id. 166, and cases there cited; *Manufacturing & Traders' Ins. Co. v. Hazard*, 30 N. Y. 230; *Dezell v. Odell*, 3 Hill, 215; *Tilton v. Nelson*, 27 Barb. 199.) Edward Smith having been made a party to the foreclosure suit, with an allegation in the complaint that he had, or claimed to have, a lien upon the premises, but which lien if any, was subsequent and subordinate to that of Mr. Roberts, his mortgage was cut off by the decree. (*Domy v. Clark*, 16 How. 424, 430; *Frost v. Koon*, 30 N. Y. 428; *Mallory v. Horan*, 49 id. 116; *McReynolds v. Munn*, 2 Keyes, 214; *Lewis v. Smith*, 5 Seld. 502; *Corning v. Smith*, 2 id. 82; *Bloomer v. Sturges*, 58 N. Y. 174; *Frost v. Koon*, 30 id. 428, 444, 446; *Hancock v. Hancock*, 22 id. 571; *Emigrant Industrial Association v. Goldman*, 75 id. 131.) The judgment in the case of *Roberts v. Benjamin and others*, having been made, whereby Mr. Smith was in terms cut off, cannot be attacked collaterally. (*Jenkins v. Fahey*, 75 N. Y. 356; *Hunt v. Hunt*, 72 id. 218; *Smith v. Nelson*, 62 id. 288; *Jordan v. Van Epps*, 85 id. 428; *Krekelin v. Ritter*, 62 id. 373; *Church v. Kidd*, 58 id. 653; *Palmer v. Hussey*, 87 id. 306.) Whatever could have been litigated in the suit of *Roberts v. Benjamin, Smith and others* these will be held concluded by the judgment. (*Clemens v. Clemens*, 37 N. Y. 73; *Stovell v. Chamberlain*, 60 id. 276; 2 Smith's Leading Cases, 787.) The petition in the proceedings in bankruptcy having been verified long after the mortgage was made to Mr. Roberts, the settlements in it were

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ex parte, and mere admissions at most. They should not be admitted as against Mr. Roberts, a *bona fide* mortgagee. (*Foots v. Beecher*, 78 N. Y. 155; *Osgood v. Manhattan Co.*, 3 Cow. 612; *Stephens on Evidence* [Reynolds' ed.], 48; *Burlingham v. Robbins*, 21 Barb. 329; *Redfield v. Carpenter*, 13 Johns. 350; *Irvine v. Cook*, 15 id. 239; *Jones v. Hurlbut*, 39 Barb. 303; *Phillips v. Thompson*, 7 Johns. Ch. 131; *White v. Chouteau*, 10 Barb. 202; *Carter v. Buchanan*, 9 Ga. 539; 2 Story's Eq. Jur., § 1225; *Bailey v. Greenleaf*, 7 Wheat. 46; *Wilson v. Boerum*, 15 Johns. 289; *Frost v. Coon*, 30 N. Y. 428; *Coyne v. Weaver*, 84 id. 392.)

C. E. Lydecker for respondents. The whole estate of the mortgagor and not merely a part of it shall pass to the mortgagee before there can be a merger. (*James v. Morey*, 2 Cow. 316; *Casey v. Buttolph*, 12 Barb. 637; *Klock v. Conkhite*, 1 Hill, 107; *Knickerbocker v. Boutwell*, 2 Sandf. Ch. 219; *Sahler v. Singer*, 44 Barb. 606.) Where there is a lien on different parcels of land for the payment of the same debt, and some of these lands still belong to the person who, in equity and justice, ought to pay such debt, and other parcels have been transferred by him to other persons, his lands shall be first charged. (*Skeel v. Spraker*, 8 Paige, 195; *Crafts v. Aspinwall*, 2 N. Y. 289.) The fact that this was a mortgage, not of a particular parcel, but of an undivided part or portion, as was also the deed, which, it is claimed, effected an extinguishment of the mortgage, does not take the case out of the rule. (Code of Civ. Pro., § 1540; 2 Edm. 327, §§ 8 and 9; *Westervelt v. Haff*, 2 Sandf. 98.) Whether there is a merger of a less estate in a greater depends upon the express or implied intention of the person in whom the estates unite. (*Bostwick v. Frankfield*, 74 N. Y. 207.) The judgment of foreclosure at Roberts' suit in 1876 could have no effect upon Smith's prior mortgage; although Smith was a party defendant to the action, Smith was not bound to appear in it. (*Emigrant Ind. Savings B'k v. Goldman*, 45 N. Y. 127.)

FINCH, J. This action was brought for the foreclosure of a mortgage to secure \$3,000 executed by defendant Benjamin to plaintiff's testator. The mortgage was produced and proved, as was also the death of Smith, the mortgagee; and the issue of letters testamentary to the plaintiff; with which proof she rested her case. The defendant has pleaded three defenses, as to which the burden of proof was upon him. The first two of these were payment and an extinguishment of the mortgage by merger. The proof adduced consisted of a series of transactions between Benjamin and Smith, and the inferences sought to be derived from their contracts and conveyances. Benjamin was originally the owner of the whole tract, which consisted of fifty-two lots, and in October, 1863, mortgaged the entire property to the testator for \$6,500. The next month a contract was entered into by the parties, which gave to Smith the right at his option to become the purchaser of an undivided half at any time within three years at the same price as the principal of the mortgage, upon condition of his also refunding the interest which should be paid on that security. In June, 1865, Benjamin and his wife conveyed to Smith, by an absolute deed, an undivided fourth part of such premises. This appears to have been a separate transaction, unconnected with the optional contract, and not a part performance of its terms, since it recites that the interest conveyed was incumbered by the mortgage on the whole premises, and was subject to the contract of sale. The consideration for this purchase was \$3,500, which the grantor acknowledges to have received. There is no evidence to the contrary. There is only the argument that Smith would not be likely to pay the full consideration, and leave his one-fourth subject to the lien of his mortgage. But if the sole practical effect was to release the lien upon the one-fourth, and leave it operative upon the three-fourths remaining in the ownership of Benjamin, which we shall presently see must have been the case, the argument loses its force, and no ground for an inference which contradicts the acknowledgment in the deed remains. On the same day of the execution of this deed, Benjamin executed a second mortgage to Smith for \$3,000,

upon the undivided three-quarters remaining in the former's ownership, and which is the mortgage now sought to be foreclosed. There is no room for rational doubt that this mortgage, though made on the same day with the deed, was executed and delivered after that instrument, for it covers the three-fourths remaining, and the deed which recites the existence of the other incumbrances makes no mention of this, but on the contrary warrants that there are no others. In February, 1867, Smith exercised his option to become the purchaser of the undivided half, and that arrangement was carried out. Benjamin conveyed for an expressed consideration of \$7,865 which Smith paid by canceling the mortgage of \$6,500, and refunding or crediting the accrued interest of \$1,365. This consideration the appellant seeks to account for in a different way. He charges Benjamin's three-fourths with only three-fourths of the mortgage, assuming, what is not at all proved, that the other fourth of the mortgage was deducted from the \$3,500 paid for one-fourth of the land. That would leave a sum of \$4,875, to which, adding the mortgage of \$3,000, we have a sum of \$7,875, or only \$10 more than the consideration named in the deed. There is here almost a coincidence of figures, and yet a difference which it will hardly do to solve by some imaginary expense, or unproved error in the computation of interest. And we are required to assume without proof, and against the written evidence, that one-fourth of the large mortgage was in fact deducted from the consideration of one-fourth of the land. We say against the written evidence, because Benjamin's deed of an undivided one-quarter carefully recites that "it is understood that the *whole* of the above-mentioned premises are covered by a mortgage for \$6,500," etc., and carefully describes the incumbrance. Such a statement amounts to an acknowledgment of a subsisting lien for that full amount, and is inconsistent with the theory that one-fourth of that mortgage was in fact at such date extinguished. If that had been true, the recital would have declared that an undivided three-quarters of the premises described as a *whole* were covered by a mortgage for \$4,875. There was, therefore, no evidence of payment of the mortgage for \$3,000,

and no fact established which even tended to prove such payment. The burden resting upon the defendant was not borne, and we may disregard on this issue the letters of Benjamin introduced in evidence, and his schedules in bankruptcy, which were received under objection, since without them the result was necessary and certain, and could not have been different. We are entirely satisfied with the conclusion that the mortgage was not in fact paid.

The second defense was founded upon the doctrine of merger. It is claimed that when the mortgagee of the undivided three-quarters took the title to the undivided half his lesser estate was drowned in the greater, and his mortgage extinguished at least *pro tanto*. But while a merger at law follows inevitably upon the union of a greater and lesser estate in the same ownership it does not so follow in equity. There the doctrine is not favored, and the estates will be kept separate where such is the intention of the parties, and justice requires it, and that intention will be gathered not only from the acts and declarations of the party, but from a view of the situation as affecting his interest, at least prior to the presence of some third person's right. (*Moffatt v. Hammond*, 18 Vesey, 385; *Gardner v. Astor*, 3 Johns. Ch. 53; *James v. Morey*, 2 Cow. 246; *Starr v. Ellis*, 6 Johns. Ch. 393; *Champney v. Coope*, 32 N. Y. 543; *Sheldon v. Edwards*, 35 id. 279.) The evidence in the case before us indicates very strongly both the intention of Smith and the understanding of Benjamin that no merger should take place, and the mortgage remain a subsisting security and a lien upon the one-quarter owned by Benjamin. The evidence relied on is two-fold. It is beyond contradiction that the interest of Smith was strongly against a merger, and that circumstance indicates his intention that none should occur. And then the letters of Benjamin, recognizing the mortgage as a subsisting debt, are introduced. All of them, except two, were written and received before the defendant Roberts took his mortgage. Those two relate only to pending bankruptcy proceedings, and could neither benefit the one party nor harm the other. The defendants' objection was

aimed at all the letters without distinguishing between them, and the objection was properly overruled, since all the letters written before Roberts took his mortgage were a part of the *res gestæ* upon the question of merger. That question was one of intention and remained open, subject to change, so long as no other right intervened. Whatever occurred between the parties alone interested during this period, indicating their intention, as it respects a merger or none, is the very matter in issue raised by the plea and the proof of the defendant. In *James v. Morey* (*supra*), it was said of the party against whom a merger was urged that "until he made a disposition of the property, and until some person acquired an interest, he was at perfect liberty to consider the mortgage merged or not as might be most beneficial ;" and it was added that his intent did not become fixed and unchangeable until some one acquired an interest, and thereby a right to draw such intent in question. Whatever occurred in such interval between the parties interested tending to show that a merger was or was not intended was admissible upon that issue as a part of the *res gestæ*. The intention to be sought out was not unchangeably fixed until the rights of Roberts intervened, and necessarily ran over the whole preceding period. The letters of Benjamin received by Smith were the dealing of the parties relating to the mortgage, and admissible as facts disclosing the intention and understanding of both.

We need not consider the admissibility of Benjamin's schedule in bankruptcy. Granting it to have been inadmissible, the evidence without it admitted of no other conclusion than that a merger had not taken place, and made a contrary conclusion impossible. Its admission, therefore, did no harm.

There was thus neither a payment nor a merger of the mortgage in suit. The effect of the conveyance by Benjamin to Smith of the undivided half was necessarily, therefore, simply that of a release of lien. In *Oliff v. White* (12 N. Y. 526), such a purchase where no merger was intended was said to have the same effect as a release by the owner of a mortgage of part of the land covered by it. That was the result here.

If the half bought by Smith had been purchased by a stranger, Smith at the request or with the assent of Benjamin might have released that half from the lien of his mortgage without at all lessening its amount, or putting in peril its lien on the remaining quarter. The same result followed upon Smith's purchase for himself, since there was neither payment nor merger, and, therefore, no extinguishment even *pro tanto* of the mortgage debt. As Smith could have no mortgage on his own property, and what he bought was paid for irrespective of the mortgage, the transaction operated solely to release one-half from the mortgage lien, leaving it to rest only upon the un-conveyed one-quarter, and so it is clear both parties understood and intended.

The defendant took his subsequent mortgage upon the same quarter after all these transactions, and has suffered no wrong. The record gave him notice of the existence of this prior mortgage, and he took subject to its lien. (*Clift v. White, supra.*)

But a third defense is pleaded. The defendant commenced an action to foreclose his mortgage, and made Smith a party defendant. In his complaint he did not set out the prior mortgage, or allude to it at all. The only allegation affecting Smith was the usual and ordinary one that certain of the defendants had or claimed an interest in the mortgaged premises, but their rights accrued subsequent to the mortgage sought to be foreclosed. That action proceeded to judgment and sale, and the property was bid in by the defendant. It is found that by the terms of sale the premises were sold free and clear of all liens and incumbrances, and that Smith knew of the judgment and made no effort to have the same modified or set aside. It is not found and does not appear that he was present at the sale, or cognizant of the manner in which it was made. It is now said that this judgment constitutes a bar. We have held the contrary. (*Emigrant Sav. Bank v. Goldman*, 75 N. Y. 137.) The expressions in the opinion in that case relating to the possible effect upon Goldman's equities of a sale discharged from his lien by his consent, and so swelling the surplus have

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no pertinency here. Goldman had a mechanic's lien which was prior to the mortgage lien enforced by sale, and was made a party and gave a stipulation waiving service of papers. He stood before the court insisting that he had waived his priority as against the judgment of sale, had assented to be treated as a subsequent incumbrancer, and so had a right in the surplus realized. It was, therefore, said that if the proofs had shown a sale made on that theory, with his priority of lien gone, he would have had an equity in the surplus. Precisely the reverse is the case here. The incumbrancer is seeking to enforce his priority and has never surrendered or waived it.

We have examined the other objections pointed out on the argument without finding any ground for a reversal.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HENRY WYNKOOP, Executor, etc., Respondent, v. THE NIAGARA
FIRE INSURANCE COMPANY, Appellant.

A policy of insurance against loss by fire or lightning, issued by defendant contained this clause: "In case differences shall arise, touching any loss or damage, after proof thereof has been received, in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators." And it was provided that no suit upon the policy should be brought against the company until after an award, "fixing the amount of such claim, in the manner above provided." The policy gave to defendant the option, in case of loss, "to repair, rebuild, or replace the property." A loss having occurred, defendant, under this option clause, elected to repair and restore the building insured to its former condition, and, after doing some work, informed the insured that the repairs were finished. The insured, claiming the repairs to be insufficient, made and served proofs of loss. Defendant orally requested the insured to arbitrate the question of damages, and after commencement of this action upon the policy, offered, in writing, to arbitrate; these offers were refused. *Held*, that the said refusal was not a defense; that defendant, having the right to determine the manner in which it would perform, and having elected to repair, this involved not only

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a rejection of the right to discharge its liability by the payment of damages, but also of those provisions of the contract having reference to that method of performance; that from the time of such election, the contract became simply an undertaking, on the part of the defendant, to restore the building insured to its former condition, and the measure of damages for a breach thereof did not necessarily depend upon the amount of damages inflicted by the peril insured against; and that, therefore, the provision as to arbitration was rendered inoperative by the election to repair.

Also *held*, that the testimony of experts called by the plaintiff, estimating the value of the different kinds of work and materials required to put the building in as good a condition as it was before the injury, was properly received.

(Submitted February 1, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon a policy of insurance issued by defendant to plaintiff's testator, insuring his dwelling-house against loss by fire or lightning.

The material facts are stated in the opinion.

J. E. Dewey for appellant. The unqualified and absolute refusal of the assured before suit to allow the amount of the claim to be ascertained, in the manner provided, was a waiver of any written request. (*Carrol v. Charter Oak, etc.*, 1 Abb. Ct. of App. Dec. 316; affirming 40 Barb. 292; *Root v. Wagner*, 30 N. Y. 17; *Chyfe v. Elmer*, 45 id. 102.) Contracts to arbitrate as to the amount are binding, and may even be a condition precedent to the right to bring an action where the amount is in question. (*Pres't, etc., v. Penn. Coal Co.*, 50 N. Y. 258, 260, 264, 270; *Cases Collected*, 16 Albany Law Jour. 464.) Where a certain mode is fixed by the parties, for ascertaining the amount to be recovered, the party who seeks to enforce the agreement must show that he has done every thing on his part which could be done to carry it into effect. (*U. S. v. Robison*, 9 Peters, 327; *Davenport v. Long Island*

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Ins. Co., 15 N. Y. Weekly Dig. 62-3; *Youmans v. Ins. Co.*, 5 *Ins. Law Jour.* 858; *Mentz v. Arm. Fire Ins. Co.*, 21 *Am. Rep.* 82.) Plaintiff, having remained silent when he should have spoken as to any defect in the repairs, will be viewed as if he had released the company from all claim for any alleged deficiency. (*Twinam v. Swart*, 4 *Lans.* 267; *Meyer v. Knickerbocker Ins. Co.*, 73 N. Y. 528; 55 *id.* 511, 512.) In equity where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. (Bigelow on Estoppel [Boston ed. 1872], 501; *Hau v. Fisher*, 9 *Barb.* 31, 32; *Niven v. Belknap*, 2 *Johns.* 589; *Hope v. Lawrence*, 50 *Barb.* 264, 265; *Floyd v. Lee*, 45 *Ill.* 277.)

T. F. Bush for respondents. By the defendant's election to repair the building the contract of insurance was superseded by a new contract for repairs. (*Merrill v. The Irving Ins. Co.* 33 N. Y. 429; *Beales v. The Home Ins. Co.*, 36 *id.* 522; *Heilman v. The Westchester Ins. Co.*, 75 *id.* 7.) The provision for an arbitration contained in the policy is collateral to the main contract for insurance, and has no reference whatever to damages resulting from a breach of contract to build or repair. (*Gibbs v. Continental Ins. Co.*, 13 *Hun.* 614.) The issue made by the defendant being as to its liability could not be the subject of arbitration. (*Robinson v. Gorges. Ins. Co.*, 17 *Me.* 131; *Mentz v. Armenia Ins. Co.*, 79 *Penn. St.* 478; *Hurd v. Litchfield*, 39 N. Y. 379.)

RUGER, Ch. J. The defendant upon the trial in various forms raised the question whether there could be a recovery in this action after the refusal of the plaintiff's testator to arbitrate the claim for damages arising under the policy of insurance upon which it was brought.

The plaintiff sued upon a policy of insurance against loss by fire and lightning to the house of plaintiff's testator. The policy contained the following provisions: "In case differences shall arise touching any loss or damage, after proof thereof has

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been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators."

"It shall be optional with the company to repair, rebuild or replace the property with other of like kind and quality within a reasonable time."

"It is furthermore expressly provided and agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided."

The evidence showed that the house of the insured was struck by lightning on the 3d day of June, 1876, and tended to show that it was seriously injured. The defendant soon thereafter, under the option clause of the policy, elected to repair the injury and restore the house to its former condition. A carpenter was employed by it to make the repairs, and after about one day's labor the defendant informed the insured that it had completed the restoration; some time afterward a mason was also employed to do work on the house and the insured was again informed that the repairs were finished. The insured always claimed that the repairs were insufficient, but declined to point out wherein the insufficiency consisted. After such attempted repairs were declared finished, and about the 26th day of August, 1876, the plaintiff's intestate duly made out and served proof of loss upon the defendant.

This action was commenced in November thereafter, and tried in May, 1881.

It appeared in evidence that the defendant's agent at some time after the injury occurred orally requested the insured to arbitrate the question of damage, which he declined to do.

The exact time when this offer was made does not appear, but it seems fairly inferable from the evidence that it was after the defendant elected to repair. It also appears, that twice after this action was commenced the defendant offered

in writing to arbitrate the question of damage with the plaintiff or his testator, which offers were respectively declined.

We do not think that any of the exceptions taken by the defendant to the rulings of the court below in declining to hold that the refusal of the insured to arbitrate was a defense to this action, were well taken. The insurers had the right to determine the manner in which they would perform their contract, and this right did not depend upon the assent of the insured. Neither his assent nor dissent could affect the power of the defendant under the contract.

The rights of the parties rested altogether in contract and the defendant assumed the responsibility of performing it according to its terms, subject to the right of the insured to damages for any breach of performance. The defendant in case of liability arising against it upon its contract had an option as to the manner in which it would discharge such liability. One mode looked to the compensation of the insured by the payment of damages for his loss, and the other to the restoration of the subject of insurance to its former condition. It could not have been contemplated by the parties that both methods of performance were to be pursued. The selection by the defendant of one of these alternatives necessarily constituted an abandonment of the other. The election of the privilege of restoration involved the rejection not only of the right to discharge its liability by the payment of damages to the insured, but also of those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties became an undertaking on the part of the defendant to build or repair the subject insured and to restore it to its former condition, and the measure of damages for a breach of the substituted contract did not necessarily depend upon the amount of damages inflicted upon the house by the peril insured against. These views have frequently been expressed by this court. In *Morrell v. Irving Fire Ins. Co.* (33 N. Y. 429) the company had availed itself of its option to restore the premises injured. DENIO, J., said: "The contract then became one for rebuilding,

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and the obligation which looked to the payment of money became obsolete and inapplicable, and the case then became the same which it would have been if the contract had obliged the defendant simply to rebuild in case of loss." To similar effect are the cases of *Beals v. The Home Ins. Co.* (36 N. Y. 522), *Heilmann v. Westchester F. Ins. Co.* (75 id. 9). Without considering the effect of the non-compliance by the defendant with the terms of the contract requiring a written request to arbitrate before suit brought, or the service of written requests after suit brought, it is sufficient to say that these provisions of the contract were rendered inoperative by the election of the defendant to adopt the alternative method of performance provided by that instrument. We can see no ground of objection to the method adopted by the plaintiff of proving his damages arising under the contract sued upon. No objection is raised to the competency of expert evidence for this purpose, and the only grounds of objection stated are that the inquiries were too general and not the proper measure of damage. The various questions objected to called for estimates by experts upon the value of the different kinds of work and materials required to put the building injured in as good a condition as it was before its injury by lightning. We think the questions objected to were based upon the correct rule of damages and were proper in form. See cases above cited.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES B. JERMAIN, Respondent, v. THE LAKE SHORE AND
MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

Where a dividend upon its stock is declared by a corporation it belongs to the holders of the stock at the time of the declaration, without regard to the source from which, or the time during which, the funds divided were acquired by the corporation.

91	483
112	534

91	488
150	9
j 150	20

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In 1857 the M. S. & N. I. R. R. Co., to whose rights and obligations defendant succeeded, issued certain preferred and guaranteed stock, the same being entitled to annual dividends of ten per cent, payable out of the net earnings of the company, and also to share *pro rata* with the common stock in any surplus. No dividends were paid upon said stock until 1863. Subsequently dividends were regularly declared and paid thereon at the rate specified, and dividends were declared and paid upon the common stock. The arrears of dividends on the preferred stock were not paid, and no dividend has been declared or funds set apart by defendant to pay the same. In 1870 forty shares of said preferred stock were purchased by and transferred to plaintiff, and defendant issued to him a certificate therefor. In an action to compel defendant to declare and pay the dividends in arrears, *held*, that the guaranty related to and was an incident of the stock and passed with it upon assignment thereof; that although the guaranteed dividends became due in 1864, and payment thereof could have been enforced by the holder of the stock, yet as no part of the net earnings was set apart to pay the same, but, on the contrary, they were otherwise appropriated, the dividends remained payable to the holder, and an assignment of the stock carried with it the right to receive and recover said dividends; and that, therefore, plaintiff was entitled to maintain the action.

(Argued February 1, 1883; decided March 6, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 3, 1882, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to compel defendant to declare and pay certain dividends alleged to be due and unpaid upon certain preferred and guaranteed stock issued originally by the Michigan Southern and Northern Indiana Railroad Company, which corporation was, in 1869, together with other railway corporations, consolidated and merged in the corporation defendant, which corporation assumed all the obligations and liabilities existing against the original companies.

The court found substantially that, in 1857, said Michigan Southern and Northern Indiana Railroad Company lawfully created and issued \$3,000,000 of preferred and guaranteed stock, the holders of which were entitled to receive a dividend or interest in preference to priority over the holders of the

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remaining stock, at the rate of ten per cent per annum, payable out of any net earnings of the company, and before any of said net earnings could be applied to the payment of dividends upon the remaining stock; and in case the earnings of the road enabled it to pay more than ten per cent dividend upon all of its stock the guaranteed stock should be entitled to share *pro rata* with the other stock in the excess. Down to July 1, 1863, no dividend was declared on said preferred stock, at which time a semi annual dividend for the six months preceding was declared and paid, and thereafter dividends at the rate specified were regularly declared and paid by said company and by defendant. The company, having accumulated a large surplus of earnings, which might have been applied to the payment of the arrears of dividends on said stock, instead thereof in 1864 and 1865 declared two dividends on the common stock, and paid the same out of said surplus, said dividends amounting to a sum sufficient to have paid all of said arrears, but no portion thereof has ever been paid, and the net earnings of said company and of defendant, its successor, aside from those appropriated to the payment of the accruing dividends on said preferred stock, have been much more than sufficient to pay said arrears, but have been applied to the payment of dividends on common stock and for other purposes.

Plaintiff claimed to be the owner of forty shares of said preferred and guaranteed stock for which he held a certificate, a copy of which as well as the facts in reference to his title are set forth in the opinion.

Edward S. Rapallo for appellant. A dividend declared of the earnings of a company becomes, thereupon, the individual property of the stockholders. (*Hill v. Newichawanick Co.*, 8 Hun. 459; 71 N. Y. 593; *Brundige v. Brundige*, 65 Barb. 397; 60 N. Y. 544, 548; *Spear v. Hart*, 3 Robertson, 420.)

Lucien Birdseye for respondents. The right of the stockholder to recover these arrears of dividends, although he did

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not become such owner of the stock till after the dividends had accrued in whole or in part, has become *res adjudicata*. (*Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157, 164, 165, 177; *Hyatt v. Allen*, 56 id. 553; *Coe v. Belfast and County Down R. R. Co.*, 2 Irish [Ch. S.], 112; *Manning v. The Quicksilver Mining Co.*, 24 Hun, 361; *City of Ohio v. Cleve. & T. R. R. Co.*, 6 Ohio St. 489.) The transfer of the principal carries with it, even although not mentioned or specified, and whether intended by the parties or not, the incidents, the accessories, and securities. (*Martin v. Mowlin*, 2 Burr. 969, 978-9; *Green v. Hart*, 1 Johns. 580; *Jackson v. Willard*, 4 id. 41; *Jackson v. Blodgett*, 5 Cowen, 202; *Pattison v. Hull*, 9 id. 744; *Langdon v. Buell*, 9 Wend. 80; *Craig v. Parkis*, 40 N. Y. 181; *Barlow v. Myers*, 64 id. 41; *Oneida Bank v. Ontario Bank*, 21 id. 490; *Allen v. Brown*, 44 id. 228-234.) So the satisfaction of the principal satisfies and discharges all the securities, incidents and accessories. (*Tillotson v. Preston*, 3 Johns. 229; *Johnson v. Brennan*, 5 id. 268; *Williams v. Houghtailing*, 3 Cow. 87; *Stevens v. Barringer*, 13 Wend. 639; *Jacobs v. Emmett*, 11 Paige, 142; *Martin v. Mowlin*, 2 Burr. 969, 979; *Green v. Hart*, 1 Johns. 580, 583.) What passed to the purchaser of the stock on his becoming the substituted shareholder was a question of law. (*Austin v. Sawyer*, 9 Cow. 39; *Pattison v. Hull*, id. 744, 745.) Stockholders in a corporation have no right or title to, or ownership of, or power to transfer, incumber, dispose of, control or enjoy its assets, property, effects, funds, moneys or securities, or any portion thereof, until a dividend is declared, or special authority given by the corporation. (*Town of North Hempstead v. Town of Hempstead*, 2 Wend. 109, 135; *Mickles v. Rochester City B'k*, 11 Paige, 118, 128; *City of Utica v. Churchill*, 33 N. Y. 161, 227; *People v. Commissioners of Taxes*, 35 id. 423, 441; *Van Allen v. The Assessors*, 3 Wall. [U. S.] 573; 584; *Miller v. Ill. Cent. R. R. Co.*, 24 Barb. 312, 330; *In re Wheeler*, 2 Abb. Pr. [N. S.] 361; *Reese v. Bank of Montgomery*, 31 Penn. St. [7 Casey] 78;

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Gray v. Portland Bank, 3 Mass. 364; *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *N. Y. and N. H. R. R. Co. v. Schuyler*, 84 N. Y. 30, 80; *McNeil v. Tenth Nat. Bank*, 46 id. 325, 331; *Leitch v. Wells*, 48 id. 585; *Kortright v. Commercial Bank of Buffalo*, 20 Wend. 91; 22 id. 348; *State of La. v. Bank of La.*, 6 La. [O. S.] 445, 447; [N. S.] 77; *Karnes v. Rochester and Genesee R. R. Co.*, 4 Abb. [N. S.] 107; *Kirby v. Potter*, 4 Vesey, 748, 757; *Wildman v. Wildman*, 9 id. 174, 177; *Rawlings v. Jennings*, 13 id. 39, 45; *Rand v. Hubbell*, 115 Mass. 461, 474; *Queen v. Arnaud*, 9 Ad. & El. [N. S.] 58; E. C. L. 806; *Browne v. Collins*, L. R., 12 Eq. Cas. 586.) Dividends, as such, belong to the party who is the actual, legal and beneficial holder and owner of the shares at the time when the dividends are declared and made payable; and until separated by the vote of the directors from the capital and funds of the corporation and made payable to the shareholder as dividends, they pass upon every transfer, sale, gift, bequest and descent of the stock or shares, and as a mere incident or accessory thereto. (*Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Clapp v. Astor*, id. 379; *Le Roy v. Globe Ins. Co.*, id. 657; *Lowerre v. American Fire Ins. Co.*, 6 Paige, 482; *Tift v. Porter*, 4 Seld. 516; *Jones v. Terre Haute & Richmond R. R. Co.*, 29 Barb. 353; 57 N. Y. 196; *Hill v. Newichawanick Co.*, 8 Hun, 459; 71 N. Y. 593; *Lombardo v. Case*, 45 Barb. 95; *Spear v. Hart*, 3 Robt. 420; *Currie v. White*, 45 N. Y. 322; *Hyatt v. Allen*, 56 id. 553; *Smith v. American Coal Co.*, 7 Lans. 317; *Re Woodruff's Estate*, 1 Tucker, 58; *Brundage v. Brundage*, 60 N. Y. 544.) The right of the stockholder is perfect to dividends declared while the stockholder is such, and without reference to the source from which, or the time during which, the funds to be divided were acquired by the company. (*Goodwin v. Hardy*, 57 Me. 143; *March v. Eastern R. R. Co.*, 43 N. H. 515, 520; *Harris v. Stevens*, 7 id. 454; *Harvard College v. Amory*, 9 Pick. 446; *In re Foote, appellant*, 22 id. 299; *Granger v. Bassett*, 98 Mass. 462; *Minot v. Paine*, 99 id. 101, 111; *Gifford v. Thompson*, 115 id. 178; *Rand v. Hubbell*, id. 461,

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474; *Phelps v. Farmers and Mechanics' Bank*, 26 Conn. 272; *Jackson v. Newark Plankroad Co.*, 31 N. J. L. [2 Vroom] 277; *King v. Paterson and Hudson R. R. Co.*, 5 Dutcher [N. J.], 504; *Earp's Appeal*, 28 Penn. St. 368; *Reese v. Bank of Montgomery County*, 31 id. [7 Casey] 78; *Gray v. Portland Bank*, 3 Mass. 363; *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *Wiltbank's Appeal*, 64 id. 256; *Burroughs v. N. C. R. R. Co.*, 67 N. C. 376 [2 Am. R. R. Rep. 213]; *Brightwell v. Mallory*, 10 Yerger, 196; *Union Bank of Tenn. v. The State*, 9 id. 490; *The State v. Franklin Bank*, 10 Ohio, 90; *Collyer v. Collyer*, 30 Ohio St. 374; *Ryder v. Alton and Sangamon R. R. Co.*, 13 Ill. [3 Peck] 516; *Lathrop v. Lathrop*, 15 Cal. 21; *Dow v. Gould & Currie Silver Mining Co.*, 31 id. 649; *Wilson v. Carman*, 2 Vesey, Sr., 672; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, id. 502; *Anson v. Twogood*, 1 Jacobs & W. 637; *Cuming v. Douglas*, 1 Jurist [N. S.], 1005; *Clive v. Clive*, Kay, 600; *Shore v. Wheatly*, 3 De Gex & S. 467; *Wright v. Warren*, 4 id. 367; *Mague v. Dandeson*, 2 Exch. 741; *Fowler v. Churchill*, 11 Mees. & W. 57; *Bristed v. Wilkins*, 3 Hare, 235; *Jagues v. Chambers*, 2 Collyer, 435; *Bartley v. Allen*, 2 Jurist [N. S.], 500; *Johnson v. Johnson*, 15 Jurist, 714; 5 E. L. & E. 164; *S. C., Murray v. Glasse*, 17 id. 816; *Feistal v. Kings College, Camb.*, 10 Beav. 491; *Price v. Anderson*, 15 Simons, 473; *McLaren v. Stainton*, 27 Beav. 460; *Wright v. Tuckett*, 1 Johns. & Hem. 266; *Bates v. McKinlay*, 31 Beav. 280; *Scholefield v. Redfern*, 8 Law Times [N. S.], 487; *In re Ezekiel Barton's Trust*, L. R., 5 Eq. Cas. 238; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; *S. C.*, 13 Jurist, 602, and 27 E. C. 114; *S. C.* affirmed, by COTTENHAM, L. Ch., 2 McN. & Gordon, 289; *S. C.*, 2 Hall & Twells, 201; 14 Jurist, 491; *McLaughlin v. The Detroit & Milwaukee R. R. Co.*, 8 Mich. 100.) The right of action to compel the specific performance of the guaranty as to the preferred shares, and to prevent the misappropriation of the income from the preferred to common shareholders, did not depend upon either the declaration or the payment of the wrongful dividends on the com-

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mon shares. (*Sturge v. The Eastern Union R. Co.*, 7 De Gex, McN. & G. 158; 3 Eng. L. & E. 406; *Henry v. Great Northern R. Co.*, 3 Jurist [N. S.], part 1, p. 1117; *S. C.*, 1 Kay & J. 1; *S. C.* affirmed on appeals, 3 Jur. [N. S.], part 1, p. 1133; *Crawford v. The N. E. R. Co.*, id. 1093; *S. C.*, 3 Kay & J. 723.) Those stockholders who acquired the stock while the original corporation was still in existence, and who continued to hold the stock certificate of that corporation, became invested with all the rights of the original subscribers for the guaranteed stock and of all intermediate holders, down to the time when the same became vested in the present parties in interest. (*Bagshaw v. Eastern Union R. Co.*, 2 McN. & Gor. 389; note *a*, p. 389; *Westchester & Philadelphia R. R. Co. v. Jackson*, 77 Penn. St. 321; Angell & Ames on Corporations [10th ed.], § 567, and note *a*; *Jones v. Terre Haute R. Co.*, 29 Barb. 353; *Phelps v. Farmers' B'k*, 26 Conn. 269.)

EARL, J. This action was brought to compel the defendant to declare and pay dividends of ten per cent per annum from June, 1857, to February, 1863, upon certain shares of guaranteed stock owned by the plaintiff. The facts in this case are the same as those found in the case of *Boardman v. The Lake Shore and Michigan Southern Railway Company* (84 N. Y. 157), except that in that case the certificate of stock was dated November 26, 1862, and in this case it is dated December 12, 1870.

The findings of the court at Special Term in reference to the plaintiff's stock are substantially as follows: That prior to the subscription for the guaranteed stock in May, 1857, some person or persons, then being a holder or holders of shares of stock in the corporation, subscribed for and took a portion of the guaranteed stock, subscribing for — shares and being awarded forty shares thereof, and that he or they afterward paid the price fixed for such shares, and the same were duly allotted to him or them; and that the same were subsequently, upon the day when the plaintiff's certificate of ownership bears date, sold and transferred to him who is now the lawful owner

thereof; that a certificate of ownership of such shares was contemporaneously with such sale delivered to him; such certificate being in the form adopted and used in such cases by the board of directors, as follows:

"The Lake Shore and Michigan Southern Railway Company guaranteed ten per cent stock. This is to certify that J. B. Jermain is entitled to forty shares of \$100 each, in the guaranteed capital stock of the late Michigan Southern and Northern Indiana Railroad Company, denominated construction stock. Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York on the first days of June and December in each year, out of the net earnings of the said company; and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed. The said stock is transferable only on the books of the said company in their office in the city of New York, by the said stockholder in person or by his attorney, on the surrender of this certificate. In witness whereof the said company have caused this certificate to be signed by their president and treasurer and countersigned by the registrar at New York this 12th day of December, 1870.

"H. F. CLARK, *President*.

"JAMES H. BANKER, *Treasurer*."

The court also found that it did not appear that the plaintiff was the owner of the stock, or of any stock at any time prior to December 12, 1870; the date of the certificate; that he did not subscribe for any of the guaranteed stock; that the certificate was the only proof given by him of his ownership of or title to the stock; that it was not proved when or under what circumstances he became the owner of the stock, except that the certificate is dated December 12, 1870; and that it did not appear how, from or through whom he acquired or derived the stock. It appeared, however, that he was recognized as a holder of guaranteed stock by the company, and that he was paid semi-annual dividends upon the stock at the rate of ten per cent an-

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nually, from and including August 1, 1870, to and until the trial of this action.

Upon these facts the court at Special Term held that the plaintiff did not acquire title to the payments or dividends due from June, 1857, to February, 1863, and upon that ground alone dismissed the complaint. He appealed to the General Term, and there the judgment against him was reversed and a new trial ordered, and then the defendant appealed to this court.

It appears in the case that the whole of the guaranteed stock of the Michigan Southern and Northern Indiana Railroad Company was subscribed for and issued in 1857, and that it has continued to exist, in whole or in part, until the present time, and that no other ten per cent guaranteed stock was ever issued by that company. Therefore the plaintiff's certificate, upon which the defendant had paid him dividends from its date to the trial of this action, furnished sufficient evidence upon its face as against it, that he had become the owner of forty shares of the guaranteed stock, by succession to one of the original subscribers therefor. That was an inference of fact found by the court at Special Term, and the defendant, in whose favor judgment was there rendered, is not in a position to dispute it here. The plaintiff must, therefore, be treated as a holder of stock which was subscribed for and issued in 1857.

We are thus brought to the sole question of law involved upon this appeal, which is whether treating the plaintiff as the assignee of forty shares of the guaranteed stock on the 12th day of December, 1870, he obtained the right to payment of the dividends which he seeks to enforce in this action.

A person who subscribed for and received the guaranteed stock in 1857 was not simply a stockholder in the company, neither was he simply a contractor with the company holding a contract which entitled him to payments of the guaranteed dividends, but he was both a stockholder and one holding such a guaranty, and the guaranty related to and was an incident of the stock and passed with it to any assignee of the stock. The certificate which evidenced his ownership of the stock also evidenced the guaranty of dividends, and the guaranty was to the person holding the stock.

The certificate issued to the plaintiff was not itself the stock, but only the evidence thereof. The stock had been in existence from the time it was issued in 1857, owned, if it had been from time to time transferred, by the successive transferees thereof. A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature, that is the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession. He can take, and is entitled to take, the surplus profits when a dividend has been declared by the proper officers of the corporation, and upon dissolution of the corporation he can take his share of the assets thereof left for distribution, *pro rata*, among the shareholders. The corporation represents the whole body of the shareholders and to it, before a dividend has been declared, belong, *in solido*, all the assets in which the shareholders, as such, are interested. When a dividend has once been declared out of net earnings, the amount of such dividend is no longer a part of the assets of the company, but is appropriated or set apart for the shareholders. They receive credit for the dividends and the corporation simply holds them as their trustee. Therefore, before a dividend has been declared, a share of stock represents the whole interest which the shareholder has in the corporation, and when he transfers his stock he transfers his entire interest, and dividends subsequently declared, without reference to the source from which or the time during which the funds divided were acquired by the corporation, necessarily belong to the holder of the stock at the time of the declaration. But when the dividend has once been declared and credited to the shareholder, the amount thereof has been separated from the assets of the corporation and been appropriated to his use. It is then no longer represented by his stock, and is no longer an incident thereof; and hence when he transfers his stock he does not transfer his dividend, which remains subject to his control.

But the claim on the part of the appellant is, that inasmuch as these guaranteed dividends were payable in 1864, long

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before the transfer of any stock to this plaintiff, they are to be treated as dividends then declared, and therefore payable to the person who then held the stock; that in 1864, by reason of the existence of net earnings sufficient to make the guaranteed dividends, the right to such dividends became vested in those then holding the guaranteed stock; that the net earnings then on hand representing the amount due for the guaranteed dividends were no longer a part of the capital or assets of the corporation, and that the right to them ceased to be an incident of the stock. This reasoning does not satisfy us. These net earnings were in no way set apart or appropriated for the benefit of the holders of the guaranteed stock. They were not even held by the company. The right of the guaranteed shareholders was repudiated and denied, and the net earnings were otherwise appropriated. They were no more legally appropriated to the payment of the guaranteed dividends than the property of a debtor is in law appropriated to the payment of debts which he refuses to recognize. The dividends, therefore, remained payable upon the stock to the holders of the stock. It matters not that payment could have been enforced by the holder of this stock; he did not then enforce it, and did not receive payment. He did not, so far as appears in the case, in any way separate his right to dividends from the stock as an incident thereto. It remained like interest payable upon any obligation which had not been paid, but which was due. An assignment of the obligation in such a case carries with it the right to receive the over-due interest, the interest being an incident of the obligation.

Interest after it becomes due may be assigned to one person, and the principal obligation may be assigned to another, as the owner of this stock could have assigned these guaranteed dividends to one person and the stock to another; but until he did so or did some act to separate the guaranteed dividends from the stock, a sale or assignment of the stock carried with it a right to the dividends, as an incident thereto. This conclusion is sustained by many analogies in the law, is believed to be in accordance with the common understanding

and practice in such cases, and is, we think, quite fully sustained by the opinion in *Boardman v. The Lake Shore and Michigan Southern Railway Co.* In that case the plaintiff did not become the owner of his stock until 1862, and yet he was held entitled to recover the guaranteed dividends from 1856 until 1863, without any other assignment to him except the assignment of the stock from the persons who held it from 1857 down to the date of the assignment to him. We do not think it is a material circumstance distinguishing that case from this, that there the plaintiff became the owner prior to 1864, whereas in this case the plaintiff became the owner after 1864. In each case the dividend was payable by virtue of the guaranty. It is true that in the prior case there was no dividend due or enforceable at the time the plaintiff took his stock, whereas there was a dividend due and enforceable at the time this plaintiff took his stock. But in both cases the dividend is due by virtue of the contract, a contract connected with, and parcel of the contract which entitles the holder to his stock. In the *Boardman Case* MILLER, J., said: "Conceding that the right of the plaintiffs depends upon a contract, that contract is connected with, relates to, and constitutes an integral part of the plaintiffs' rights as a stockholder. It cannot be separated from the rights accruing by virtue of the stock which the plaintiffs hold; and being thus a part and parcel of the same, it passes with the transfer as one of the incidents, and as composing an essential element thereof. A sale or assignment of the stock transferred by operation of law, all benefits to be derived from the same and all profits, income or dividends or right to dividends by contract which formed a constituent, valuable and inseparable portion of the stock. When the contingency happened, specified in the contract, the right to dividends became fixed, and existed independent of any act of the corporation, or its officers. It became absolute and perfect in the stockholder, without a declaration to that effect, and passed as an incident of the stock upon the transfer." Again, "we think it cannot be maintained, upon any sound principle, that the contract for the payment of dividends con-

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tinues to each stockholder only during the time he holds the stock and accrues only to his benefit during that period, and that a separate and distinct assignment of the dividends was essential in order to confer title upon the owner." The case of *Manning v. The Quicksilver Mining Co.* (24 Hun, 361) is a case precisely in point. There the owner of certain preferred shares of stock in a mining company, after having sold the same and delivered the certificates thereof to one person, assigned to another all his right, title and interest in and to the interest due upon the assigned shares of stock, which he had previously owned. By the terms of the certificates interest was guaranteed to be paid annually, but out of the net earnings of each year, providing so much in the year preceding had been earned. It did not appear that there had been any separation of this interest from the other assets of the company, or that any of the earnings of the company had been assigned to the payment of the interest, and it was held that the right to recover the interest was merely an incident to the shares themselves, and depended upon the title thereto, and that the assignee of the interest could not maintain an action to recover the interest or compel the company to account therefor.

We are, therefore, of the opinion that the decision of the General Term is right, and should be affirmed, and judgment absolute ordered against the defendant, with costs.

All concur, except ANDREWS and RAPALLO, JJ., taking no part.

Order affirmed and judgment accordingly.

MARY E. MANN, Administratrix, etc., Respondent, v. The PRESIDENT, MANAGERS AND COMPANY of the Delaware and Hudson Canal Company, Appellant.

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M., plaintiff's intestate, who was an engineer in defendant's employ, was killed by the collision of the train he was running with freight cars stand-

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ing on the track of defendant's road at O. The accident occurred on a dark and foggy night. A freight train was being made up at O. and the main track and switch were both occupied. The usual signal to stop a train was the swinging of a red lantern. In addition, the rules of the company required its flagman on foggy nights to use torpedoes which were provided for that purpose. There were three brakemen upon the freight train, two of them regular brakemen, and one, T., an extra man; it was defendant's custom to keep extra men at O. to supply the place of regular brakemen, sick or absent. T., about a week before the accident, applied to defendant's general train dispatcher for a position as brakeman and was advised that he might get a job at O., to which place he went and reported to the yard-master, and he had prior to the accident made two or three trips as brakeman. He was selected by the conductor of the freight train to take the place of a regular brakeman. The yard-master requested the conductor to send out a flagman to flag the expected train. One of the regular brakemen started to do this, but the conductor directed him to remain and sent T. The latter did not take or use a torpedo, and had not been informed of, and did not know of the rule requiring such use; he had never flagged a train in the night except the second night before, on which occasion the conductor found fault with, and discharged him for not obeying orders. T. failed to properly signal the approaching train, and this omission occasioned the accident. *Held*, that the evidence justified the submission to the jury of the question as to the negligent performance, by defendant, of the duty it owed to its servants, to use due care in the selection of competent co-servants.

(Submitted February 5, 1883; decided March 6, 1883.)

APPEAL from judgment of the Supreme Court in the third judicial department, entered upon an order made May 2, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for alleged negligence causing the death of Judson W. Mann, plaintiff's intestate. Mann was an engineer in defendant's employ. While running the engine drawing a passenger train, he was killed by a collision of his train, with freight cars standing on the track at Oneonta, where a freight train was being made up.

The facts appearing as to the circumstances of the accident, are stated substantially in the opinion.

Henry Smith for appellant. The motion for nonsuit should

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have been granted. No cause of action was proved. (*Harvey v. N. Y. C., etc.*, 88 N. Y. 481.) The conductor of the train being made up under his direction was a co-employee of Mann, and no recovery should have been allowed for any thing resulting from his fault. (*Tinny*, 52 N. Y. 632; *Besel*, 70 id. 174; *Sammon*, 62 id. 254; *Henry v. S. I. R. R. Co.*, 81 id. 373; *Crispen v. Babitt*, id. 516; *Murphy v. B. & A. R. R. Co.*, 88 id. 146.)

L. L. Bundy for respondent. The motion to nonsuit was properly denied. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Painton v. Northern R. R. Co.*, 83 id. 7, 14.) The question of negligence is one for the jury, whether it depends upon conflicting evidence or inferences to be drawn from circumstances. (See *Payne v. Troy & Boston R. R. Co.*, 83 N. Y. 572, 574; *Hain v. Smith*, 25 Hun, 146; *Brickner v. N. Y. C. R. R. Co.*, 2 Lans. 512; *Laning v. N. Y. C. R. R. Co.*, 40 N. Y. 521, 528-9, 532-3.) It was the duty of the defendant to use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which its servants were engaged with a reasonable degree of safety to life, and security against injury. (*Gilman v. The Eastern R. R. Co.*, 10 Allen, 239; *Cons v. D. L. & W. R. R. Co.*, 81 N. Y. 206; 15 Hun, 172, 174; *Walsh v. Kelly*, 49 N. Y. 556, 558; *Requa v. City of Rochester*, 45 id. 130, 137; *Ayrault v. Pacific Bank*, 47 id. 570, 576; *Hoyt v. Railroad Co.*, 57 id. 679; *Walsh v. Mead*, 8 Hun, 394.) It is required to furnish competent and trusty servants to run the road; and if it is guilty of negligence in the performance of that duty, then it is responsible to the servants who are injured in consequence of the neglect and incompetency of that servant whom they have thus employed. (*Jones v. N. Y. C. R. R. Co.*, 22 Hun, 284; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549, 553, 555; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Mehan v. S. B. & N. Y. R. R. Co.*, id. 585; *Kain v. Smith*, 80 id. 458; *Fuller v. Jewett*, id. 46, 52; *Crispin v.*

Babbitt, 81 id. 516, 521; *Wood's Master and Servant*, §§ 438, 451, 453; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Slater v. Jewett*, 85 N. Y. 73; *Oothof v. Wolf*, 22 id. 355, 360, 362; *Brickner v. N. Y. C. R. R. Co.*, 2 Lans. 515; 49 N. Y. 672; *Laning v. N. Y. C. R. R. Co.*, id. 524.)

ANDREWS, J. The jury found that the immediate negligence which caused the death of the plaintiff's intestate, was the omission of Townsend, the brakeman employed to go on the freight train which was being made up at Oneonta, to properly signal the train coming from Binghamton on which the intestate was engineer. This train was past due nearly two hours. Both the main and side tracks of the defendant's road, at Oneonta, were occupied. There was an engine on the side track, connecting by an open switch with the main track, on which the train from Binghamton was approaching, and there were loaded cars on the main track. The way was blocked and a collision was inevitable, unless the movement of the coming train was arrested. The accident occurred about 4:50 A. M. The night was dark and foggy. The usual signal to stop a train was the swinging a red lantern by a person standing in front of it before it reached the point of danger. In addition to this signal, the rules of the company require that on foggy nights, flagmen should use torpedoes which the company had provided for that purpose. It is admitted that Townsend who was sent out by Benedict, the conductor of the freight train, to signal the intestate's train, did not take with him, nor use torpedoes, although it was a case in which, according to the rules and under the circumstances, as the jury might properly find, torpedoes should have been used. Whether Townsend went far enough in the direction of the expected train, or swung the lantern as he should have done, is not shown except by his evidence. It is plain that the plaintiff's intestate did not see the signal if it was given, and the evidence tends to show that he was at his post discharging his duty. The signals from his train were heard for several miles before it reached Oneonta. The station signal, and signal for brakes on approach-

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ing that station, were given as usual, and Townsend testified that as the train passed him, he saw a person in the usual place of the engineer with his hand on the throttle of the engine. The credibility of Townsend was seriously impaired on his cross-examination, and the jury had doubtless a right to conclude that he did not use proper diligence in giving the lantern signal on the occasion in question. They were, therefore, justified in finding that the accident was attributable to the neglect to give proper signals, and also that there was no contributory negligence on the part of the deceased.

But the court properly charged that the defendant was not liable for the negligence of Townsend, unless he was an incompetent person to be sent to flag the train, and his employment for that purpose was the negligent act of the defendant. The general facts in respect to the employment of Townsend, are, that about a week before the collision, he applied to the general train dispatcher of the defendant at Albany, who was authorized to employ men, for a position as brakeman on defendant's road, and was in substance informed that if he went to Oneonta he might get a job. It was the custom of the company to have extra men at Oneonta to supply the place of brakemen sick or temporarily absent. Townsend went to Oneonta and reported to Richmond, the yard-master there. He had made two or three trips as brakeman on defendant's road prior to the time of the collision. His name was entered on the books of the defendant as an extra man. He was selected on the morning of the accident in question by Benedict, the conductor of the train which was to start from Oneonta for Binghamton, to take the place of one Lynch, a regular brakeman who was sick. There were two competent and experienced brakemen, Brewer and English, making with Townsend the usual number. It was the practice where a regular brakeman was disabled or prevented from acting, to select from among the extra men a brakeman to act in his place, and the selection of Townsend was made pursuant to the practice. Before the collision, Benedict, the conductor, and the three brakemen, including Townsend, met at the yard to make up the train, and Rich-

mond requested the conductor to send out a flagman to flag the expected train. One of the two regular brakemen started to do this, but the conductor directed him to remain to assist in making up the train and instructed Townsend to signal the train, and he started to do it, taking a red lantern. There is no reasonable doubt upon the evidence that Townsend was an incompetent and unsuitable person to discharge the important and responsible duty of flagman. He was about twenty-one years old, with scarcely any experience as a brakeman or flagman, and had not been informed of and did not know of the rule requiring the use of torpedoes. He had never flagged a train, in the night, except the second night before, when he was acting as brakeman on a train on defendant's road on which occasion the conductor found fault with him for not obeying orders, and discharged him, as the evidence tends to show, for that reason.

It is claimed by the defendant that assuming the incompetency of Townsend, his selection for the duty of flagging the intestate's train, was the negligent act of Benedict, the conductor, and that the defendant having furnished other competent and experienced brakemen, who might have been selected by Benedict, the company is not liable. We think this claim cannot be supported, in view of the doctrine now firmly settled in this State, that no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exonerate the master from responsibility to a co-servant who has been injured by its non-performance. The duty to use due care in the selection of competent servants, is one of the master's duties. The duty of selection, in case of corporations, must be delegated. But any negligent act or omission in its performance, is the act or omission of the master. In *Laning v. N. Y. C. R. R. Co.* (49 N. Y. 521; 10 Am. Rep. 417), the actionable negligence upon the case as presented, was found in the employment of Westman, who had after his original employment by the defendant, become incompetent by intemperate habits, and who selected the incompetent men to build the scaffold. But

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Flike v. B. & A. R. R. Co. (53 N. Y. 549 ; 13 Am. Rep. 545), and *Booth v. B. & A. R. R. Co.* (73 N. Y. 38 ; 29 Am. Rep. 97), show that if Westman had been a fit man to be intrusted with the duty, his negligent employment of incompetent men would have rendered the defendant liable. In the *Flike Case*, Rockefeller was a competent man, but his omission to see that the proper number of brakemen were sent with the train, was held to be an omission of the master for which the principal was responsible. In the *Booth Case*, arising out of the same accident as the *Flike Case*, the point was made that as it then appeared, that by the rules of the company, it was the conductor's duty to report to Rockefeller any deficiency of brakemen, and that the conductor omitted to perform this duty, the omission was that of a co-servant merely ; but this court overruled the point on the ground that no matter whose immediate negligence it was to start the train without sufficient brakemen, it was in law the negligence of the defendant. In *Fuller v. Jewett* (80 N. Y. 46 ; 36 Am. Rep. 575), the same rule was applied in respect to the duty of the master to provide suitable machinery and keep it in repair. The work of repairing the engine in that case was committed to competent mechanics with proper instructions, but they failed to perform the duty properly, and the master was held responsible for the omission. In this case it does not appear that Benedict knew that Townsend was an unfit person to be sent to flag the train. The company had apparently, without any inquiry as to his qualifications, put him in the position of an extra man, who might be selected by a conductor to fill a vacancy, thereby giving an assurance of his competency for the position. Even if Benedict was negligent in selecting Townsend, he was in so doing acting in place of the master, and his negligence was the defendant's negligence. The power to select a temporary brakeman from the extra men was conferred upon Benedict. The brakemen were subject to his orders. It would be unreasonable that the master should confer upon a subordinate the power to select a man for so important a duty as that intrusted to Townsend, and be exonerated from responsibility on the ground

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that the subordinate was negligent in its performance. The primary wrong was the placing of Townsend among the extra men without inquiry as to his fitness, or instructing him as to the rules of the company. The negligence of Benedict, if it existed, was secondary and co-operative merely. These views cover the questions presented.

We think there was no error committed on the trial, and that the judgment should be affirmed.

All concur, except EARL, J., not voting, and RAPALLO, J., absent.

Judgment affirmed.

In the Matter of the Final Accounting of HORACE GRAY et al., Executors, etc., of the Estate of RICHARD WARREN WESTON.

There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with the direction; what is a reasonable time must depend upon the circumstances of each particular case.

It seems that where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, i. e., eighteen months, may serve as a just standard.

Among other assets left by a testator, which, by the will, his executors were directed to convert into money, was an interest in certain real estate which was incumbered by mortgages. The executors failed to sell; they paid off the incumbrances and expended further sums of money for taxes, and in the care and preservation of the property. A large proportion of said expenditures were after the expiration of the eighteen months. In the executors' accounts the items of payment upon the mortgages were entered as debts allowed and paid in a statement of "moneys paid, * * * to the creditors of the deceased." Certain contestants, among whom were infants, who appeared by special guardian, filed specific objections to the accounts. No objection was stated to the payment of the mortgages. The accounts were sent to an auditor; after the close of the evidence before him, the adult contestants stated that they would not press any objections to the accounts, in

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respect to said property. The guardian for the infant contestants filed no exceptions to the auditor's report, the adult contestants did; the surrogate decided that the notice given the auditor was equivalent to a withdrawal of all objections as to said expenditures. *Held* no error.

The adult contestants appealed, the special guardian did not. *Held*, the objection that the infants did not join in the notice, and so were not bound thereby, could not be urged upon the appeal; that the adult contestants were bound by their own action, and the infants by the decree which, as they had not appealed, was conclusive as to them.

The repeal by the act of 1880 (Chap. 245, Laws of 1880) of the act of 1870 (Chap. 359, Laws of 1870) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the repealing act took effect.

In proceedings so pending *held*, that the surrogate could not exceed the maximum amount limited by the Code of Procedure (§ 309); also that, although the costs were taxed after the Code of Civil Procedure without effect, they were not affected by its provisions, as by it (§ 3847, subd. 11) the provisions of the chapter (18), in reference to Surrogates' Courts, are with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880.

(Argued February 5, 1883; decided March 6, 1883.)

THESE are cross-appeals from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 30, 1882, which modified and affirmed as modified a decree of the surrogate of the county of New York, on the final accounting of the executors of the will of Richard Warren Weston, deceased. (See mem. of decision below, 27 Hun, 455.)

The testator died in May, 1873. These proceedings were instituted on the application of the executors in July, 1877. The surrogate's decree was entered in October, 1880.

The will, after certain devises and bequests, directed the executors to convert all the rest, residue and remainder of his estate, real and personal, into money, and to divide the net proceeds into three equal shares, one which he gave and bequeathed to them in trust, with power to invest and keep the same invested in bonds or securities of the government of the

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United States, whereof the interest was payable in gold, or in such other securities as to them should seem most for the benefit of the fund designed to be created, and to apply the interest, income and profits of such share to the use of his son Warren, until he should attain the age of twenty-five years, and then the share was to be paid over and transferred absolutely to him. The other two shares were in like manner directed to be invested and held in trust, one for the benefit of each of the testator's two daughters during her natural life. The executors were required, as soon as might be after the decease of the testator, to pay and discharge all his just debts. Letters testamentary were issued to the executors in June, 1874.

The principal subjects of controversy were in relation to fifteen hundred shares of the St. Louis and Iron Mountain Railroad Company, part of the assets which were undisposed of at the time of accounting, and in relation to certain real estate situate at Dobbs' Ferry, and expenditures thereon. The material facts in relation to them are stated in the opinion.

George H. Foster & Samuel Hand for contestants. The executors having disobeyed the testator's wishes, and having overstepped their powers in making the expenditures on the real estate, cannot be credited with them in their account. (*Cornwell v. Deck*, 2 Redf. 87; *Vyse v. Foster*, L. R., 8 Ch. App. 309; *Ackerman v. Emott*, 4 Barb. 623, 646; *Adair v. Brimmer*, 74 N. Y. 546; *Heinsman v. Heard*, 50 id. 27; *Hopper v. Adees*, 3 Duer, 235.) The direction of the Supreme Court, as to reducing the allowance to the executors' counsel by the surrogate from the fund, was correct. (*Noyes v. Society*, 70 N. Y. 481; *Denn v. McFourkey*, 15 Hun, 443; *Hurd v. Warren*, 16 id. 622; Laws of 1870, chap. 359, § 12.) The Supreme Court had the discretion to reduce the allowance, and that discretion is not reviewable here. (*Noyes v. Children's Society*, 70 N. Y. 481.) Under the provision of the will the beneficiaries were entitled to the interest or income of the trust fund from the death of the testator. (*Williamson v. Williamson*, 6 Paige, 298, 306; *Cowenhoven v. Shuler*, 2 id. 132;

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La Ferrins v. Bulwer, 2 Sim. 19; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Lupton v. Lupton*, 2 Johns. Ch. 614-627; *Hepburn v. Hepburn*, 2 Brad. 74, 76; *Feams v. Young*, 9 Ves. 549.) Where the relation of trustees and *cestui que trust* is created, trustees are obliged to take the same care and use the same diligence as factors and agents. They are answerable, not only for their own fraud and gross negligence, but also for all faults which are contrary to the care required of them. (*Ackerman v. Emott*, 4 Barb. 626; *King v. Talbot*, 40 N. Y. 76; 50 Barb. 453; *Perry on Trusts*, §§ 458-460; *Steele v. Babcock*, 1 Hill, 527.) Good faith or honest intentions do not excuse violation of instructions. (*Heinemann v. Heard*, 50 N. Y. 27.) The intentions of the testator as to the St. L. and I. M. R. R. stock, at the time of his purchase, is no protection to the executors. (*Adair v. Brimmer*, 74 N. Y. 539, 546, 550-551, 552-553, 554; *Ackerman v. Emott*, 4 Barb. 626; *Clough v. Bond*, 3 M. & C. 490, 496; *Ringold v. Ringold*, 1 H. & G. 25; *King v. Talbot*, 40 N. Y. 76, 78.) A direction to trustees even, to invest at discretion, does not authorize them to invest in securities, not legally approved, for the investment of trust funds. (Hill. on Trustees, 368, 369, 378, note 1, 494, 495; *Peacock v. Reddington*, 5 Ves. 794; *King v. Talbot*, 40 N. Y. 81, 83.) Trustees are responsible for doing acts unauthorized by the instrument creating a trust. (*Fenwick v. Greenwald*, 10 Beav. 412; *Pearce v. Pearce*, 22 id. 248; *Kellaway v. Johnson*, 5 id. 319; *Wilkinson v. Parry*, 4 Russ. 272; *Clough v. Pond*, 3 M. & C. 490; *Hancom v. Allen*, 2 Dick. 498; *Trafford v. Boehm*, 3 Atk. 440.) It does not make it prudent or diligent to have held these stocks, bonds and real estate contrary to the directions of the will, that the executor Ward, individually, or Baring brothers bought these St. Louis and Iron Mountain R. R. securities, or that the executor Gray owned half the Dobbs' Ferry property. (*Adair v. Brimmer*, 74 N. Y. 562; *McCabe v. Fowler*, 84 id. 318; *Ormiston v. Olcott*, id. 339; *Matter of Dean*, 86 id. 398; *Hun v. Cary*, 82 id. 65.) The surrogate could only pass on the correctness of pay-

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ments to creditors and legatees, for necessary expenses and for the services of the executors, and whether they had been charged all the money, whether principal or interest, with which they were legally accountable, at the time of the settlement of the account, and the correctness of allowances for services and charges for increase. (*Seaman v. Whitehead*, 78 N. Y. 308; *Despard v. Churchill*, 53 id. 192; *Bevan v. Cooper*, 72 id. 317; *Riggs v. Craig*, Oct., 1882.) The costs in this matter having been allowed in October, 1880, should have been allowed in pursuance of the Code of Civil Procedure. (Code, § 3352; *Supervisors v. Briggs*, 3 Den. 173; *Rich v. Hosson*, 1 Duer, 617; *Smith v. Castlers*, 5 Wend. 81; *Bank v. Willoughby*, 1 Sandf. 667; *Scudder v. Gori*, 18 Abb. Pr. 207; *Meere v. Westervelt*, 14 How. 281; *Ackley v. Tarbox*, 19 Abb. Pr. 119; *Steward v. Lamoreaux*, 5 id. 14; *Hunt v. Middlebrook*, 14 How. Pr. 300; *Rader v. Road District*, 36 N. J. L. 282; *Theriot v. Prince*, 12 How. Pr. 451.) The surrogate's decree was erroneous in its provisions as to allowances. (*Devin v. Patchin*, 26 N. Y. 441; *Reed v. Reed*, 52 id. 651; *Seaman v. Whitehead*, 78 id. 306.)

Aaron Pennington Whitehead for executors. The General Term had no power to review the decree of the surrogate, because no exceptions were taken to said decree. (Code of Civ. Proc., §§ 2570, 2576, 997; *Ingersoll v. Bostwick*, 23 N. Y. 425; *Mayor of N. Y. v. Erben*, 24 How. 358; *Douglass v. Day*, 3 Keyes, 434; *Bissell v. Studley*, id. 213; *Enos v. Eigenbrodt*, 32 N. Y. 444; *Weed v. H. R. R. Co.*, 29 id. 616; *Hunt v. Bloomer*, 13 id. 341; *Brush v. Lee*, 1 Trans. App. 66; Redfield's Law and Practice of Surrogates' Courts, 777, 790.) If the executors decided in a *bona fide* exercise of a reasonable discretion not to sell the principal securities belonging to the estate, they cannot be called upon to bear a loss merely because the conclusion to which they came turned out unfortunately. (3 Williams on Executors [Perkins' ed.], 1895-1896, marg. pp. 1796-1797; *King v. Talbot*, 40 N. Y. 76; *Buxton v. Buxton*, 1 M. & C. 80; *Thompson v. Brown*, 4

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Johns. Ch. 627; *Lansing v. Lansing*, 45 Barb. 193; *McRae v. McRae*, 8 Bradf. Surr. 199; *Rowth v. Howell*, 3 Vesey, 565; *East v. East*, 5 Hare, 343; *Johnson v. Newton*, 11 id. 160; *Clack v. Holland*, 19 Beav. 262-271; *Garrett v. Noble*, 2 Sim. 504; *McCabe v. Fowler*, 84 N. Y. 314; *Ormiston v. Olcott*, id. 339.) The executors did in good faith exercise a reasonable discretion and are fully justified in the course adopted by them. (*Hughes v. Empson*, 22 Beav. 181; *Bates v. Hooper*, 5 De G. M. & G. 337; *Morgan v. Morgan*, 14 Beav. 72; *Wightwick v. Lord*, 6 H. of L. Cases, 217; *Buxton v. Buxton*, 1 M. & C. 80; *Lowson v. Copeland*, 2 Bro. C. C. 156; *Marsden v. Kent*, Eng. L. R., 5 Ch. Div. 598.) The conclusion of the General Term that the executors exercised a reasonable discretion is a conclusion of fact, and no appeal lies to this court therefrom. (*In re Ross*, 87 N. Y. 514; *Davis v. Clark*, id. 623.) Executors have eighteen months in which to dispose of securities. (*Gillispie v. Brooks*, 2 Redf. 349.) The executors were justified in exercising the discretion they did in the management of the estate. (Perry on Trusts [2d ed.], §§ 444, 452, 457, 460, 465; Hill. on Trustees, 369, 378; 3 Williams on Executors [Perkins' ed.], 1797, 1804, 1805, 1816; *King v. Talbot*, 40 N. Y. 76; *Brayton's Ex'rs v. Graydon*, 23 N. J. Eq. 229-233; *S. C.*, 25 id. 561; *Peacock v. Livingston*, 5 Ves. 794; *Phillips v. Phillips*, Freeman's Ch. 11; *Lawson v. Copeland*, 2 Brown's Ch. 156; *Fletcher v. Walker*, 3 Madd. 73; *Tebbs v. Carpenter*, 1 id. 290; *Moyle v. Moyle*, 2 Russ. & M. 710.)

FINCH, J. The decree of the surrogate, and the judgment of the General Term, refusing to charge against the executors the loss resulting from the depreciation of the St. Louis and Iron Mountain railroad stock, were right and should be affirmed. The appellants do not attack this conclusion upon the ground of negligence or bad faith, and substantially concede that the discretion of the executors, if they had any, was exercised fairly and with ordinary prudence, although the result has been disastrous. But the argument is put upon the ground that by the

terms of the will it was made the duty of the executors to sell "promptly;" that the testamentary direction was "peremptory;" and any delay, not necessary and unavoidable, was a violation of an express duty, and so involved responsibility for loss. But the will contains no such arbitrary or peremptory command. It does direct a sale, but does not say when, or under what circumstances, or at all fetter the usual and ordinary discretion of executors to wait a reasonable time for the proper performance of their duty. What, under all the circumstances, was such reasonable time, and did the executors exceed it, became the vital questions on this branch of the case, and their answer involves a view of the surrounding circumstances, and some just and fair allowance for the peculiar emergency. It must be granted that the stock was somewhat of a dangerous and speculative character, subject to great and sudden fluctuations of value, and not such as a trustee could select for an investment of trust funds without responsibility for a loss. But the executors did not make this investment. They found the stock among the assets. Without their fault it came upon their hands, and they had to care for and dispose of it, with all its inherent risks on the one hand and possibilities on the other. That the testator thought well of it they had ample evidence. He had bought one thousand shares in August and September of 1872, at about fifty-nine per cent, and the remaining five hundred shares later. These last were not paid for by the deceased, but were being carried by his brokers. His death occurred on the 7th of May, 1873, and a memorandum relating to this stock was found among his papers, describing it as "to be held firmly; a dividend expected in two years." The executors thus found themselves confronting an emergency, and with the path of duty before them somewhat blind and difficult. Why the testator should have made the memorandum except for the guidance and enlightenment of those who came after him, it is impossible to say; and while it did not bind them, it was advice they were justified in taking into account. The testator had acted upon the judgment contained in his memorandum. In January of 1873, the stock had sold at 94, but from that

time on, had fallen to 85 at about the date of testator's death. He, therefore, had held it firmly on a falling market, and so strengthened by his conduct the impression left by his written advice. Letters testamentary were granted on the 6th of June, 1873, and the judgment and discretion of the executors was then called into play, for it was possible to sell the stock at once for about 80. Should they do so, or wait, was the important inquiry, to be answered with sole reference to the welfare of the estate committed to their care. They consulted, and took the best advice attainable and determined to wait. The stock had been above par the year before, and under all the circumstances, with the advice and example of the testator both before them, and their own justifiable confidence in the value of the stock, it is quite certain that their conclusion was reasonable, and their delay excusable. As the stock continued to fall, the reason for waiting grew stronger to men who had confidence in its inherent value. After a delay of three months, came a panic in September. A storm of fright and distrust swept over the stock market, during which valuable securities were depreciated and sacrificed, and prices dropped suddenly and low. Certainly it was no time then to sell. The stock was paid for, and the estate strong and able to carry it through the unexpected emergency. If the executors then had lost courage, and, demoralized by the alarm around them, had thrown the stock overboard at 55, or less than its cost, it would have been easy to say that the trustees chose the worst possible time in which to sell, and acted from terror and not from judgment. And so they waited again, as prudent men similarly situated would have certainly done. The depression continued during the remainder of the year, but with symptoms of improvement in the early months of 1874. In February the recovery had brought the stock back to 67. At this point, it is said, the executors should have sold; but while the price was better than that of the panic, it was little better, and still much below its value when originally received. It is easy to see now that it would have been wiser to have sold, and had the executors known then what they and we know now, they would undoubtedly have done so. But they did not and

could not know. The indications pointed to an eventual restoration of value, and we cannot say that it was imprudent or unwise to expect and wait for it. But in April came another heavy fall, the stock dropping to 30, and in June of that year when their inventory was filed, it was appraised at 20, although on the 14th of that month it was selling at 15. That is the history of the first year's holding by the executors. Facts are put in evidence showing the expectation and progress of a movement for consolidation; the persistent holding by one of the executors, through the same period, of stock of the same corporation owned by him individually; and the similar holding of much larger blocks by business men of acknowledged capacity and judgment. Since the value of the stock at the hearing before the auditor was greater than the inventory value of June, 1874, the question of responsibility for loss relates wholly to the omission to sell during the first year. There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. (*Hughes v. Empson*, 22 Beav. 181; *Buxton v. Buxton*, 1 Myl. & C. 80; *Garrett v. Noble*, 6 Sim. 504; *Bate v. Hooper*, 5 De G., M. & G. 338; *Morgan v. Morgan*, 14 Beav. 72; *Marsden v. Kent*, L. R., 5 Ch. Div. 598.) The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this State, at all events, there is no arbitrary standard. The executor, here, cannot be compelled to account until after eighteen months; and yet it may be his duty to sell even earlier than that, or to wait even longer, according to the circumstances of particular cases, and

the exigencies which exist. Where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard. It was so held by the learned surrogate of New York in the case of *Gillespie v. Brooks* (2 Redf. 355). There the will directed the executors to invest the residue of the estate, and the duty of selling the bank, insurance, mining and manufacturing stocks on hand was just as plain and necessary as if there had been a specific direction to convert them into money. It was conceded, in that case, and held by the surrogate that a reasonable time for the disposition of the "irregular securities" would be eighteen months. Substantially the same doctrine was held in *Lockhart v. The Public Administrator* (4 Bradf. 21). While such period furnishes a convenient guide where no special circumstances exist, it must, after all, not be taken as a fixed or arbitrary standard. The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs. (*King v. Talbot*, 40 N. Y. 76; *Thompson v. Brown*, 4 Johns. Ch. 627; *McRae v. McRae*, 3 Bradf. 199.) Stocks of variable value ought not to be timidly and hastily sacrificed, nor unwisely and imprudently held. Even where there is a direction to sell, reasonable time must be given, and what that is must be determined in each case by its own surroundings. Here the estate was large. A trust fund was early constituted which furnished enough of income for the immediate wants of the beneficiaries. They made no complaint at the time because the stock in question was held. If the result had been a gain to them they would have been thankful for the delay. For the loss which did result we think, under all the circumstances, the executors should not be charged.

Among other assets left by the testator, and covered by the direction to convert into money, was a country seat of large value, situated at Dobbs' Ferry, and overlooking the Hudson river. The testator owned only the undivided half; his partner, Gray, who became one of the executors, owning the remainder. The property was incumbered by mortgages of \$54,000, which were outstanding and unpaid at the testator's death.

The executors tried to sell in the usual and ordinary way, at private sale, but failed. The range of possible purchasers was narrow. Those who could afford to own and keep up such a residence were not numerous, and the panic of 1873 tended to lessen their number and make them more than usually prudent and cautious. Such offers of purchase as were made fell far below the intrinsic value of the property, and the executors held it. They paid off the mortgages and expended further sums of \$12,576.90, for taxes upon, and the care and preservation of the property. Of this last amount, \$5,133.93 was paid during the first eighteen months of the executors' administration; and the balance of \$7,442.97, later. The auditor found that from the testator's death to the date of his report there had been no such demand for the Dobbs' Ferry property as to establish a market price for it, and that said executors had not been able, by due diligence, to effect a proper sale of the property. He, therefore, allowed the payments by the executors upon incumbrances and for expenses, and the surrogate confirmed the allowance, but the General Term reversed so much of the decree as gave credit for the amounts paid upon incumbrances and the expenses incurred, upon the ground that a sale ought to have been made within the eighteen months, and the executors had no authority to pay off the mortgages. In so doing, it was declared, they were neither paying debts, nor converting the property for investment. It is now contended that the General Term were wrong for several reasons.

When the original account was filed which claimed the credits in controversy, the contestants filed specific objections. There was a general objection that the executors failed to convert all the property into money, and a special objection on the same grounds, naming the Dobbs' Ferry property, and alleging that the holding of the real estate had involved large expenses for care and management, insurance and other protection of the same and payment of interest thereon. The objections then added: "These objectors accordingly claim that the said executors are liable to make good to the said estate the losses sustained in manner aforesaid, of all which they propose to make

proof; and they also object to all *such* items of extra expenditures contained in the said account as have been *occasioned* by the *aforesaid* acts or omissions of the said executors." There was no objection to the payment of the mortgages. The items of such expenditure were stated in the accounts, but were entirely unchallenged. They were stated, too, as payments to "creditors." They were included in schedule D, which is described in the account as containing a statement of "all the claims of creditors presented to and allowed by us," and "of all moneys paid by us to the creditors of the deceased." The one-half of the mortgages was thus claimed to be a debt of the estate, for which it was liable, and which as a debt had been allowed and paid. To this claim no objection was filed; against it no evidence has been produced, and it will not do now to reject it on the ground that it was not a debt, and the estate was not bound for its payment. But further than that, it also appears that after the close of the evidence before the auditor, and when the contestants knew and understood the exact situation upon the proofs, their counsel formally notified the auditor that they should not press their objection to the account in respect to the North Shore and Staten Island Ferry Company, and the real estate at Dobbs' Ferry. When the case came before the surrogate, the infant contestants, through their special guardian, filed no exceptions to the auditor's report. The adult contestants did, but as to the Dobbs' Ferry property the surrogate held that the notice given to the auditor "was equivalent to a withdrawal of the objections referred to, and was done by counsel then representing the contestants, and their action cannot be interfered with by counsel subsequently retained or substituted." We are of the opinion that the surrogate correctly construed the notice and its effect. It amounted to a waiver and abandonment of the objections referred to. Good faith and fairness require that its force should be admitted. It stopped the argument in that direction before the auditor. It, perhaps, prevented an application to the auditor to open the proofs and take further evidence, and certainly, as we have seen, influenced and controlled the action of the sur-

rogate. We do not see how we can justly disregard it. The ground taken by the General Term is based upon the fact that the guardian for the infants did not unite in the notice. That is true, but he not only filed no exceptions to the auditor's report, but did not appeal from the decision of the surrogate. He is not here. The rights of the infants are not before us. The only persons before us and prosecuting the appeal are the very contestants, and those only, who withdrew these objections. They are bound by their own action, and the infants by the decree from which they did not appeal. So far then as the payment of incumbrances is concerned, we must hold they were debts for which the testator was personally liable. They are claimed to be such in the account; credited as such; not objected to, and we do not feel at liberty to charge the executors by presuming there was no bond or personal covenant. What remains is the question as to taxes and expenses incurred by reason of not selling the land. As to so much of these as accrued after the eighteen months, there would be room for very serious debate had not the objection been formally withdrawn. There was justice and fairness in that withdrawal. The evidence had shown that at the worst the executors, acting in good faith, and trying to do their duty, had only been guilty of an error of judgment. The contestants concluded either that no liability followed, or if it did, that it would be harsh and hard to enforce it, and so gave the notice which practically withdrew the objection. To allow them now to take back their notice and insist on the objection would permit one to trifle with the administration of justice in a manner which we cannot approve. We must, therefore, agree with the surrogate and disagree with the General Term as to the items relating to the Dobbs' Ferry property.

Both sides complain of the disposition made of the allowances granted by the surrogate. He awarded \$7,500 to the executors for a counsel fee, to the contestants \$1,000, and to the guardian *ad litem* of the infants \$2,000. These allowances were made upon the authority of the law of 1870 (Chap. 359, § 12); and the General Term held that the repeal of that act

in 1880 (Chap. 245) did not prevent its application to the present case, but its just construction was subordinate to the provisions of the Code limiting the total allowance to \$2,000. In that we think the General Term were right. In *Noyes v. Children's Aid Society* (70 N. Y. 481) we held that in giving allowances under the act of 1870 the surrogate is confined to the "manner" laid down in sections 308 and 309 of the Code, and cannot exceed the maximum limit of the amount which may be allowed, fixed by said sections, and must follow the process by which that amount may be arrived at, which is prescribed therein. The General Term has followed, and acted upon that decision, not only in the present case but in others. (*Down v. McGourkey*, 15 Hun, 444; *Hurd v. Warren*, 16 id. 622.) All that is now urged to the contrary is a suggestion of harmful consequences, and that the limit of \$2,000 was never intended to be made applicable to "the long and expensive contests" in the Surrogates' Courts. We think it was, and are not without hopes that its effect will be to shorten their duration and render them less expensive, without at all endangering the ability of executors and administrators to defend themselves and the estates which they represent.

The appellants, however, insist that the power to make allowances is still further limited by the provisions of the Code of Civil Procedure, and those apply, because the costs were taxed in October, 1880, and after that Code took effect. Its own provisions leave it not applicable. By section 3347, subdivision 11, the eighteenth chapter, among others, is made applicable only to an action or special proceeding commenced on or after September 1, 1880, except as to certain sections which do not affect the question of costs before us. We see no reason, therefore, for disturbing the conclusion of the General Term upon the subject of the allowances. Other questions raised in the case have been examined, but need not be specially considered.

The judgment of the General Term, so far as it modifies the decree of the surrogate, by refusing credit to the executors for the amounts paid upon incumbrances, and for taxes and ex-

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penses on account of the Dobbs' Ferry property, should be reversed, and in other respects affirmed with costs to the executors, to be paid out of the estate.

All concur.

Judgment accordingly.

In the Matter of the Probate of the Will of JAMES O'NEIL,
deceased.

In drawing an instrument presented for probate as a will, a printed blank consisting of four pages, was used. The formal commencement was printed on the first page and the formal termination printed at the foot of the third page. The entire blank space was filled in, in writing; and apparently for want of room, a portion of a paragraph containing material provisions was carried over, and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or any thing indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below under the formal attestation clause on the third page. *Held*, that this was not a subscription "at the end of the will," such as is required by the Revised Statutes (2 R. S. 63, § 40); that the parts of the will preceding the signatures could not be received, as so far as its execution was concerned, the will was valid or invalid as a whole; and that probate was properly denied.

It seems that a document containing testamentary dispositions not authenticated according to the provisions of the statute of wills may not be held to be a part of a valid will, simply because it is referred to in the body of the will.

Tonnels v. Hall (4 N. Y. 140), distinguished.

(Argued February 6, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which reversed a decree of the surrogate of the county of Essex, admitting to probate an instrument purporting to be the will of James O'Neil deceased, and refused probate. (Reported below, 27 Hun, 130.)

91	516
124	487
124	405
91	516
126	248

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In drawing the instrument in question, a printed blank was used, folded in the middle, like an ordinary sheet of legal cap; at the top of the first page was a printed heading; the rest of that page, the whole of the second page and part of the third page was left blank. This blank was all filled with writing; just preceding the printed formal termination on the third page was the following:

"13th. And I authorize and empower my executors, herein-after named, to sell, convey, assign and transfer my real property for the payment of the bequests hereinbefore named and mentioned either at private —"

Then followed the printed matter, the names and dates in italics being in writing as follows:

"Likewise I make, constitute and appoint *Dennis Daley, of the town of Moriah, Essex county, State of New York, George T. Treadway, also, Edward Donohoe, all of Moriah*, to be executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto subscribed my name and affixed my seal the 28th day of *February*, in the year of our Lord one thousand eight hundred and *eighty*.

[L. S.]

JAMES O'NEIL.

The above instrument, consisting of one sheet, was at the date thereof subscribed by *James O'Neil* in the presence of us and each of us, he at the time of making such subscription acknowledged that he made the same and declared the said instrument so subscribed by him to be his last will and testament; whereupon we then and there at his request and in his presence and the presence of each other subscribed our names as witnesses thereto.

Dennis Daley, residing at Mineville, N. Y.

George T. Treadway, residing at Mineville, N. Y.

Edward Donohoe, Mineville, N. Y."

On the fourth page was the following apparent continuation of the thirteenth paragraph:

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"Or public sale and in the manner which they will deem the most profitable and advantageous to my said estate, but in no case shall my said executors be process by law or otherwise to sell and convey and dispose of my said real property before the lapse of five years after my death unless my said executors shall see fit and proper to sell and dispose of the same by virtue of the power and authority hereinbefore given them as aforesaid."

The will so drawn was read to the testator, the portion written at the top of the fourth page being read as if written in the blank space preceding the printed matter on the third page.

Matthew Hale for appellants. Both the spirit and the letter of the statute were observed in this case, and after having heard the entire contents of the will, the testator put his name at the only place which by any fair mode of construction could properly be termed its end. (*Tonnele v. Hall*, 4 Comst. 140; *In re Washington Park*, 52 N. Y. 131; *In re Peach*, 1 Sw. & Tr. 138; *In re Kimpton*, 3 id. 427; *In re the Goods of Birt*, L. R., 2 P. & D. 213; *In re the Goods of Wotton*, L. R., 3 P. & D. 160; *In re Coombs*, L. R., 1 P. & D. 302; *Hitchcock v. Thompson*, 6 Hun, 279; 1 Jarman on Wills, 107, note; *Matter of Gillman*, 38 Barb. 364; *Cohen's Estate*, 1 Tuck. 286; *Kelly Case*, 67 N. Y. 416.)

Samuel Hand for respondents. The burden was upon the proponents to show affirmatively that the mind of the testator went with his will. (*Rollwagen v. Rollwagen*, 63 N. Y. 519; *Tyler v. Gardiner*, 35 id. 595, 596.) Every last will and testament of real and personal property, or both, shall be subscribed by the testator at the end of the will, by at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will. (3 R. S. [3d ed.] 144; *In re Goods of Birt*, L. R., 2 P. D. 213; *In re Goods of Kimpton*, 3 S. & T. 427; *Wells v. Low*, 5 Notes of Cases, 428; *Ayres v. Ayres*, id. 375; *Smee v. Bryer*, 6 id. 420; *In re Goods of Hoey*, 2 Robt. Eccl.

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140; *Millward's Case*, 1 Curtis, 912; 1 Jarman on Wills, by Randolph & Talcott, 250; *Dallow's Case*, L. R., 1 P. D. 189; *In re Goods of Dearle*, 47 L. J., P. D. 45; 18 Alb. L. J. 359; *Sweetland v. Sweetland*, 4 S. & T. 6; *James v. Patten*, 6 N. Y. 9; *Davis v. Shields*, 26 Wend. 341.) The language and intent of the statute must control, not the intent of the testator. (*Hayes v. Hardin*, 6 Penn. 409; *Glancey v. Glancey*, 17 Ohio, 134; *Tonnele v. Hall*, 4 Comst. 140; *Sisters of Charity v. Kelly*, 67 N. Y. 410.) There is no such reference to the words following the will as to incorporate them into the instrument. (*Van Straubenzee v. Monck*, L. R., 32 P. D. 21; *In re Sunderland*, L. R., 1 P. D. 198; *In re Pascoll*, id. 606; *In re Dallow*, id. 189; 1 Jarman on Wills, Randolph & Talcott, 229; *In re Watkins*, L. R., 1 P. D. 19; *In re Brewis*, L. J. D. & D. 24.)

RUGER, Ch. J. The matter in controversy arises between some of the heirs at law and the executors, over the alleged improper execution of what purports to be the will of James O'Neil.

The instrument was drawn upon a printed blank, consisting of four pages, the formal commencement being printed on the first page and the formal termination, also printed, appearing at the foot of the third page, and the intermediate space being originally left blank for the insertion of such special provisions as the testator might desire to make. When presented for probate the entire blank space was filled in, and it being apparently insufficient in extent to contain all of the provisions sought to be introduced into the will, the thirteenth seems to have been carried over and finished on the first eight or ten lines of the fourth page. That portion of the will seems in no way to be authenticated, and leaves a blank space of two-thirds of a page below the written lines. The names of the testator and of the witnesses were subscribed toward the bottom of the third page, below the formal printed termination of the will, and there only. The portion of the thirteenth paragraph, immediately preceding the printed termination,

was manifestly incomplete, and the lines written on the fourth page were obviously a continuation of this broken paragraph. The two portions, were not, however, sought to be connected by means of a reference, asterisk, words or symbol, indicating the relation to each other. Material provisions are contained in the writing upon the fourth page. Upon this state of facts the question is raised that this is not such a subscription and signing by the testator and the witnesses at the "end of the will," as is required by our statute. (2 R. S. 63, § 40.) The application of some of the elementary principles governing the interpretation of statutes would seem to furnish a safe and certain guide for the determination of the question presented. The words of the statute must be construed in their plain, obvious sense, according to their signification among the people to whom they were directed. (*Ogden v. Saunders*, 12 Wheat. 332; Story on Const., § 449.) Also that construction must be adopted which will effectuate, as far as possible, the intent of the framers of the statute, and obviate the anticipated evils which were the occasion thereof. (*Tonnele v. Hall*, 4 N. Y. 140.) The legislative intent was doubtless to guard against frauds and uncertainty in the testamentary disposition of property, by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons. (Reviser's Notes; *Willis v. Lowe*, 5 Notes of Cases, 428.) The question then arises whether the "end of the will" referred to in the statute means the actual physical termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that in isolated cases the latter construction might sometimes preclude the perpetration of a wrong — it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases. While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution.

In the latter case courts do not consider the intention of the testator, but that of the legislature.

In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel. In all of them, however, there was a failure to observe the rules of construction which we consider controlling. We think, however, that the weight of authority favors the theory, that the statute fixes an inflexible rule, by which to determine the proper execution of all testamentary instruments.

The cases cited from the English Reports, except certain ones hereinafter referred to, do not afford much assistance in construing our statute, from the fact that they cover a period during which material changes were wrought in their statutes and the further fact that those statutes differ in material respects from our own. The statute of 15 and 16 Victoria, chap. 24, among other things provided that no signature "shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." From this alone might be deduced arguments sufficient to dispose of the question involved in this case if our statutes contained similar provisions.

As early as 1847 Sir Jenner Fust, in the case of *Willis v. Lowe* (*supra*), says: "Cases have occurred before the real purpose of the act had been ascertained in which the court has given construction to the statute as far as possible to fulfill the real intention of the parties; but the court is under the necessity of looking at the clear intention of the act. The court was of the opinion at first that the intention of this part of the act was to remove the difficulty which had arisen under the statute of frauds, by the construction of which, a signature at the commencement of the will was equally good with the signature at its end. But there was another reason for the provision, viz.: to guard against fraud. The act required the signature to be at the foot or end of the will to prevent any addition to the will being made after its execution in presence

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of witnesses." In *Dallow's Case* (L. R., 1 P. & D. 189) immediately following the signatures of the testator and the witnesses was the clause "my executors are," A., B. & C. The will contained clauses in the body referring to his executors as "hereinafter named," but they were named in no other place except after the signature. It was held that the clause naming the executors could not be admitted to probate, Sir J. B. Wilde saying: "The question is whether under St. Leonard's act (15 and 16 Victoria), the clause appointing executors can be admitted to probate. Although parol evidence may show that the clause appointing executors was written before the signature it is not made manifest by any words in the will of the testator so describing that clause when he referred 'to my executors hereinafter named.' And parol evidence cannot be received for that purpose, and it seems to me also that it would be directly contrary to the statute which requires the will to be signed at the foot or end to permit probate in this will."

In *Sweetland v. Sweetland* (4 Swaby & Tristram, 6), Sir J. B. Wilde says: "I have no doubt the testator did intend to execute in proper form the will; the question is whether he has done so."

In *Hays v. Harden* (6 Penn. St. 409), GIBSON, J., says: "Signing at the end of the will was required to prevent evasion of its provisions."

In *Glaney v. Glaney* (17 Ohio St. 134), DAY, Ch. J., says: "The testator is required by this portion of the statute to sign his will at the end thereof. The reason of this requisition is obviously to prevent improper alterations of a will." "The provision is a judicious one, and care should be taken not to break in upon it by a lax interpretation."

We think this question has been substantially determined in this court in the case of *The Sisters of Charity v. Kelly* (67 N. Y. 409). FOLGER, J., says: "Can we say that the end of the will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is there

shall be the name. It is to make a new law to say that where we find the name there is the end of the will." "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions."

It will be seen in all of the cases cited there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will.

It is claimed by the counsel for appellant that the clause in question may be regarded as an interlineation and thus held to be constructively a part of the body of the will. We think that this claim cannot be supported without opening the door to all of the evils which the statute was intended to prevent, and substantially abrogating its wholesome provisions.

The same argument would validate the addition of a fourteenth paragraph to the unauthenticated lines appearing on the fourth page and lead, by logical deduction, to indefinite extension. It is said also that the cases holding that a paper or document referred to in the body of a will may be considered as a part thereof afford support to the construction claimed by appellant's counsel.

It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will. It was held in *Tonnelle v. Hall* (4 N. Y. 140), that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the county clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the will. It is to be observed that the paper there in question was

referred to merely to identify the subject devised and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such additions, and that the maps could probably have been used as evidence to identify the property devised, even if no reference had been made thereto in the will. Independent of authority the argument upon principle leads inevitably to the conclusion that the will was improperly executed. The signatures to it are confessedly between the various operative and disposing parts of the instrument, and in no sense at the literal or physical end of the will. That the signatures are where the testator intended the will should end we have already seen is not a material circumstance. A blank space covering two-thirds of a page of foolscap paper is left immediately after the language we are invited to insert in this will, and no possible guard is provided against the addition thereto of any such provision as the person in possession of this paper may be tempted to make. There can be no answer to the proposition that to uphold this will is to defeat the object of the statute in requiring a will to be subscribed at the end. The opportunity of adding indefinitely to a testamentary provision will be legalized by so holding, and the statute, instead of establishing an inflexible rule by which to determine the proper execution of a will, will be open to as many different constructions as varying circumstances may invite. We thus arrive at the conclusion that the will in question was not properly executed and it cannot, therefore, be admitted to probate. The claim that such parts of the will as precede the signatures may be received and the remainder rejected cannot be supported. The statute denies probate to a will not executed in accordance with its provisions. It is either valid or invalid as an entirety as far as its execution is concerned. It is undeniable that the portion following the testator's signature contains material provisions and formed part of his scheme in making a will. At all events we have no way of determining the extent to which he deemed them material, and cannot give effect to one part and deny force to another. This point

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was decided adversely to the appellant in *The Sisters of Charity v. Kelly*, and other cases above cited.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

ALICE BUCKINGHAM, as Executrix and Trustee, etc., Appellant,
v. ERASTUS CORNING, Impleaded, etc., Respondent.

A devisee cannot maintain an action to have a mortgage upon the lands devised, executed by his testator to secure a usurious loan, canceled because of the usury, without first paying, or offering to pay, the sum actually loaned; he is not a "borrower" within the meaning of the provisions of the usury laws (1 R. S. 772, § 8; § 4, chap. 430, Laws of 1837), declaring such payment or offer to be unnecessary as a condition of granting relief where suit is brought by the borrower.

(Argued February 7, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 30, 1882, which affirmed a judgment in favor of defendant Corning, entered upon an order sustaining a demurrer to the complaint.

The complaint alleged in substance that on the 23d of August, 1866, James Horner and James Ludlum, being partners in business, made and executed in New York, to Erastus Corning, since deceased, their bond and mortgage on certain lands in New Jersey belonging to their partnership, to secure a loan to said partnership from said Corning of \$68,915, and that the transaction was usurious; that afterward said Corning died and the said bond and mortgage came by transfer to Erastus Corning, the defendant, who now owns the same; that afterward James Horner died, and by his will devised all his interest in the lands covered by the mortgage to the plaintiff, Alice Buckingham, three-fourths of which interest was to

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belong to said Alice Buckingham, absolutely, as devisee, and one-fourth of said interest she was to hold as trustee for Susan Horner, and appointed said Alice Buckingham executrix of said Horner's estate; that the partnership estate of said Horner & Co. is unsettled, and that defendant Andrew Kirkpatrick has been appointed, by the Court of Chancery in New Jersey, receiver of the same, and is now, as such receiver, vested with the title, both real and equitable, of said partnership estate; that the receiver was requested by the plaintiff to bring this action, or to join with the plaintiff in doing so, and refused.

Plaintiff asked for judgment, declaring said mortgage void for usury, and that it be delivered up and canceled.

There was no allegation in the complaint of any tender or offer before suit brought to pay the plaintiff the sum of money admitted to have been actually loaned.

The defendant Corning demurred to the complaint, on the ground of defect of parties, and that the facts alleged do not constitute a ground of action.

Theodore W. Dwight for appellant. Assuming that the plaintiff in this case can be regarded as a borrower, this action can be maintained in its present form. (*Williams v. Fitzhugh*, 37 N. Y. 444; *Wyeth v. Braniff*, 84 id. 627.) In a case like the present the plaintiff is a borrower and entitled to the benefits of the statute. (*Post v. B'k of Utica*, 7 Hill, 391; *Sands v. Church*, 6 N. Y. 347; *Cole v. Savage*, 10 Paige, 583; *Livingston v. Harris*, 11 Wend. 329; *Williams v. Fitzhugh*, 38 N. Y. 444, 448, 449; *Fullerton v. McCurdy*, 4 Lans. 132; *Allerton v. Belden*, 49 N. Y. 373; *Wheelock v. Lee*, 64 id. 242; *Marsh v. House*, 13 Hun, 126; *Schermerhorn v. Tallman*, 14 N. Y. 93; *Alden v. Diossy*, 16 Hun, 311.) The party who had the direct benefit of the loan is a borrower. (*Allerton v. Belden*, 49 N. Y. 373; *Wheelock v. Lee*, 64 id. 242.) The plaintiff in this case, regarded as the executrix under the will of James Horner, or as trustee of Susan Horner, and as *cestui que trust* under this will, can maintain this action as a "borrower" under the statute. (*Smith v. Jackson*, 2

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Edw. Ch. 28; *Buckley v. Buckley*, 11 Barb. 43; 1 Washburn on Real Property, p. 201, ¶ 12 [4th ed.]; *Foster's Appeal*, 74 Penn. St. 308; *Silvoni v. Kirkman*, 1 M. & W. 418, 423; *Quick v. Ludburrow*, 3 Bulstrode, 30; *Marshall v. Broadhurst*, 1 C. & J. 403; 2 Parsons on Contracts, Part 2, chap. 1, § 8; *Merch's' Eo. Nat. B'k v. Com. Warehouse*, 49 N.Y. 642; *Livingston v. Harris*, 11 Wend. 343; *Equitable L. Ins. Co. v. Cuyler*, 75 N. Y. 515; *Moor v. Devoe*, 22 Hun, 208; *Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137.) An equitable owner may be regarded as a borrower under the statute, as between him and the legal owner. The plaintiff as a beneficiary under James Horner's will, and independent of her executorship, is such an equitable owner. (*Eq. Life Ins. Co. v. Cuyler*, 12 Hun, 247, 249; affirmed, 75 N. Y. 511.) The executors of the borrower are included in the term "borrower." (*Livingston v. Harris*, 3 Paige, 528; *S. C.*, 11 Wend. 335; *Post v. Pres't of B'k of Utica*, 7 Hill, 398, 400, 411; *Cole v. Savage*, 1 Clarke, 482; 10 Paige, 590; *Wheelock v. Lee*, 64 N.Y. 247; *Mech's' B'k v. Edwards*, 1 Barb. 271; *Perine v. Striker*, 7 Paige, 598; *Morse v. Thayer*, 9 id. 197.)

Amasa J. Parker for respondent. The complaint does not state facts sufficient to constitute a cause of action, because it does not contain an allegation of a tender before action commenced of the sum borrowed with interest. (*Williams v. Fitzhugh*, 37 N. Y. 444, 453; *Rogers v. Rathbone*, 1 Johns. Ch. 367; *Bissell v. Kellogg*, 60 Barb. 617; *Livingston v. Harris*, 11 Wend. 329; *Allerton v. Belden*, 49 N. Y. 377; *Post v. B'k of Utica*, 7 Hill, 391.) The plaintiff is not a "borrower" within the language of the statute. (*Cole v. Savage*, 10 Paige, 583; *Post v. B'k of Utica*, 7 Hill, 391; *Vilas v. Jones*, 1 N. Y. 274; *Rexford v. Midger*, 2 id. 131; *Schermerhorn v. Tallman*, 14 id. 94; *Marsh v. House*, 13 Hun, 126; *Wheelock v. Lee*, 64 N. Y. 242; *Allen v. Diossy*, 16 Hun, 311; *Smith v. Cross*, id. 487; *Allerton v. Belden*, 49 N. Y. 373, 377.) No right of action of a deceased partner, who leaves a surviving partner, exists in the legal representatives

of the deceased. (*Evans v. Evans*, 9 Paige, 178; Story on Part., § 344; *Solomon v. Fitzgerald*, 9 Heisk. 552; *Whitney v. Cotton*, 53 Miss. 689; Jones on Mort., § 1416; *Cullum v. Butre*, 1 Ala. 126; *Jones v. Parsons*, 25 Cal. 100.)

ANDREWS, J. The bond and mortgage executed by James Horner and James Ludlum to Erastus Corning, deceased, dated August 23, 1866, for the sum of \$68,915, upon the facts averred in the complaint and admitted by the demurrer, were usurious and void. The plaintiff, as executor of James Horner, could interpose the defense of usury in an action brought against her in her representative capacity, to enforce the bond, and she could also as devisee of the real estate covered by the usurious mortgage, defend on the same ground, an action of foreclosure. (1 Rev. Stat. 772, § 5; *Brooks v. Avery*, 4 N. Y. 225.) But the plaintiff as executor cannot maintain an action in equity to have the bond surrendered up and canceled, for the reason that she has a perfect defense at law, and no necessity for an equitable remedy is shown (*Allerton v. Belden*, 49 N. Y. 375), and whether as devisee of the land, she can bring an action for relief against the mortgagee to have it canceled as a cloud upon the title, without offering to pay the sum actually loaned, depends upon the question whether the devisee of a mortgagor in a usurious mortgage, is a *borrower* within the meaning of the fourth section of the Usury Act of 1837, or the provisions of the Revised Statutes upon the same subject (1 R. S. 772, § 8). It was held by the chancellor in *Cole v. Savage* (10 Paige, 583), that a grantee with warranty of a mortgagor in a usurious mortgage, of the lands covered by the mortgage, was a borrower within the spirit, though admittedly not within the letter of the statute, and he also expressed the opinion that the statute extended to the sureties, heirs, devisees or personal representatives, of the original borrower.

This broad construction of the statute was overruled by the Court of Errors, so far as it related to grantees of the borrower, in *Post v. The Bank of Utica* (7 Hill, 391), in which it was held that a subsequent grantee of premises covered by a usuri-

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ous mortgage was not a borrower within the act of 1837. This case was followed in *Rexford v. Widger* (2 N. Y. 131), which was an action by a mortgagee to set aside a prior judgment confessed by the mortgagor alleged to be usurious, and which was an apparent lien on the mortgaged premises, and it was held that the action could not be maintained without the plaintiff paying or offering to pay the sum actually due on the judgment. In *Post v. The Bank of Utica*, the dictum of the chancellor in *Cole v. Savage* that the sureties, heirs, devisees, and personal representatives of the borrower, were borrowers within the act of 1837 was repeated by some of the senators who delivered opinions in that case, but this point was not at all involved in the judgment. In *Vilas v. Jones* (1 N. Y. 274), Judge BRONSON expressed the opinion that a surety of a borrower, was not a borrower within the statute. The case did not go off upon this ground, and the point was not then adjudicated. But the point did arise in the case of *Allerton v. Belden* (*supra*), where it was held that an accommodation indorser of a usurious note, whose indorsement was made before the note had an inception, and to aid the makers in securing the usurious loan, was not a borrower within the act of 1837, and could not maintain an action for the cancellation of the note without offering to pay the sum loaned. There was another point considered by the court, also decisive of the case, but both points were decided. It is claimed that the decision might have been different if the surety had been a party to the principal contract, but it is to be observed that that was the position of the complainant in *Vilas v. Jones*, above referred to, and this court in its opinion in *Allerton v. Belden* expressly approved of the observation of BRONSON, J., in the former case, as to the position of a surety under the act of 1837. Nor does there seem to be reason for any distinction depending on the mere form of the surety's obligation.

It will thus be seen that sureties, and grantees, two of the classes of persons supposed by the chancellor in *Cole v. Savage*, to be within the statute of 1837, have by subsequent decisions been excluded from its operation. The tendency of judicial opin-

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ion to limit the application of the word "borrower" to the person who borrowed the money, and was at the time a party to the contract, and who continued to stand in the position of borrower, is very marked. In *Schermerhorn v. Talman* (14 N. Y. 93), it was held that the actual borrower, who had after the usurious loan become bankrupt, and subsequently re-purchased the property covered by the usurious loan, on a sale by the assignee in bankruptcy, could not maintain an action to set aside the usurious security, the decision proceeding on the ground that although he was the borrower in fact, he had lost his character as such by the transfer and the re-purchase of the property, and was not entitled to the benefit of the act. In *Wheelock v. Lee* (64 N. Y. 243), it was held that an assignee in bankruptcy could not maintain an action to compel the delivery up of collaterals turned out by bankrupt to secure a usurious loan, or to have an obligation given by the bankrupt therefor declared void for usury, without offering to pay the sum loaned, on the ground that the assignee, although a trustee for both the bankrupt and creditors, was not a borrower within the act of 1837.

This line of cases is, we think, decisive against the maintenance of this action. The opinion entertained in some of the early cases, that the act of 1837, extends to persons claiming under, or in privity with, the original borrower, as well as to the borrower himself, cannot in the light of the adjudications, be supported. The legislature, in the act, used a word having a definite and limited meaning. The act conferred a special and peculiar privilege upon the actual borrower. It permitted him, without conforming to the general and established principle of equity, to keep the money borrowed, and at the same time compel the cancellation of the usurious security. The statute proceeded doubtless in part upon the policy of discouraging usury, but also upon the theory that the borrower was the victim of the usurer. But the privilege is personal purely. The borrower is not bound to avail himself of it, and it may be very inequitable for him to do so. In this case the plaintiff's testator paid the interest on the mortgage

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for several years, until his death. He did not exercise the right under the act of 1837, to disincumber his estate of the usurious mortgage during his life, and this right did not, we think, pass upon his death to his heirs, devisees, or representatives.

This leads to an affirmance of the judgment.

All concur.

Judgment affirmed.

JOHN F. TALMAGE, Respondent, v. THE THIRD NATIONAL BANK
OF THE CITY OF NEW YORK, Appellant.

M. & Co., who were brokers and agents for H., having authority from her to pledge certain stocks belonging to her for a loan of \$35,000, made a contract with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for H., and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. In an action for an alleged conversion of the said stocks defendant claimed the right to hold the same as security for other loans made by it to M. & Co. *Held* untenable; that defendant had no right to assume that M. & Co. had authority to make other loans, at least, in the absence of any statement that the subsequent loans were made for the benefit of H., and this although M. & Co. had a power of attorney absolute on its face.

Plaintiff tendered, before suit was brought, the \$35,000 and interest, and on this being refused tendered \$46,000. *Held*, that this was not conclusive as an admission that defendant had a lien for the latter sum; and that defendant was not entitled to a deduction of that amount from the value of the stocks, but only of the amount of its lien.

An action in the Supreme Court against a National bank need not be brought in the county where the bank is located, but may be brought in any county where the plaintiff resides.

Hagadorn v. Rauz (72 N. Y. 586); *Casey v. Adams* (102 U. S. 66), distinguished.

(Argued February 8, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an or-

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der made September 12, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial. Also, appeal from order of said General Term, made at the May term, 1882, affirming an order of Special Term, denying a motion to change the place of trial from the county of Kings to the county of New York. (Reported below, on appeal from order changing place of trial, 27 Hun, 61.)

This action was brought to recover damages for the alleged conversion of certain stocks.

The material facts are stated in the opinion.

S. P. Nash for appellant. As Julia G. Hunt, under whom plaintiff claims, delivered the stocks sued for to Moller & Co., with blank transfers and powers of attorney which enabled them to invest a holder with a perfect title, and also gave them express authority to use the stocks as security for money to be borrowed by them, any private understanding, therefore, with Moller & Co., as to the sum they were authorized to borrow did not affect the defendant. (*F. & M. B'k v. B. & D. B'k*, 16 N. Y. 125; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30, 66-68; *People v. B'k of N. A.*, 75 id. 547, 562; *Merchs' B'k v. Livingston*, 74 id. 223, 227.) Plaintiff was estopped by the tender of \$46,000, under the note of Nov. 29, from claiming that only \$35,000 was due. (*Eaton v. Wells*, 82 N. Y. 576.)

William N. Dykman for respondent. The action was properly tried by the Supreme Court in Kings county. (Code of Civil Procedure, § 3343; *L. R. R. Co. v. Leston*, 2 How. 497; *Marshall v. B. & O. R. R. Co.*, 16 id. 314; *Covington, etc., Co. v. Shepperd*, 20 id. 227; *O. & M. R. R. Co. v. Wheeler*, 1 Black, 286; U. S. R. S., § 5136, subd. 4; id., § 5198; *N. O. Nat. B'k v. Adams*, 3 Woods, 21; *Cooke v. State N. B'k*, 52 N. Y. 109; *Robinson v. N. B'k of Newberne*, 81 id. 387; *Brinkerhoff v. Bostwick*, 88 id. 55; *S. S. B'k v. S. C., etc., R. R. Co.*, id. 115; *Casey v. Adams*, 102 U. S. 66.) Mrs. Hunt or

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her assignee may assert her ownership of these securities unless the bank honestly believed that Moller & Co. owned the stocks. (*Merchants' B'k v. Livingston*, 74 N. Y. 223; *Gould v. F. L. & T. Co.*, 23 Hun, 322; *McNeil v. Tenth Nat. B'k*, 46 N. Y. 325.) When Moller and Mr. Booth attempted to fasten other liens on Mrs. Hunt's stocks they were equally dishonest, and equally violated trust relations, for a pledge is a bailment and bailment is a trust. (Story on Bailments, § 2.) The plaintiff was entitled to have a verdict directed for the full value of the stocks. (*Kortright v. Cady*, 21 N. Y. 348; *Haskins v. Kelly*, 1 Robt. 160; Tyler on Pawns, 551; *Lawrence v. Maxwell*, 53 N. Y. 23.) The tender of \$46,000 is not conclusive upon plaintiff that defendant's lien was valid to that amount. (*Astley v. Reynolds*, 2 Strange, 915; *Harmony v. Bingham*, 12 N. Y. 99, 109, 116; *Briggs v. Boyd*, 56 id. 289; *Scholey v. Mumford*, 60 id. 498.)

MILLER, J. The stocks to recover the value of which this action was brought, were originally pledged as collateral security for a loan made by the defendant to Moller & Co., for the benefit of Julia G. Hunt, the plaintiff's assignor. They were afterward used to secure moneys loaned to Moller & Co., on their own account by the bank. Moller & Co. were the brokers and agents for Mrs. Hunt, and the question to be determined is whether the defendant, the bank, had knowledge that they were loaning to Mrs. Hunt and receiving her stocks in pledge for the sum of \$35,000 only, and that Moller & Co. were her agents and not the owners of the stocks. (*Merchants' Bank v. Livingston*, 74 N. Y. 223; *McNeil v. The Tenth Nat. Bank*, 46 id. 325; 7 Am. Rep. 341.) This question was one of fact which was left to the consideration of the jury, under the charge of the court, and the jury found in favor of the plaintiff. It appears that the stocks were delivered to Moller & Co., as agents of Mrs. Hunt, with authority to use the same for the purpose of procuring the loan first made thereon, and unless the defendant was advised as to the character and extent of the agency, it should not be held liable. Certain stocks had been

purchased by Moller & Co. for Mrs. Hunt, and they gave their notes with the stocks as collateral, and received the money to pay for the stocks so purchased. There was proof to show that Moller went to the president of the bank and made the loan of \$35,000 with him, stipulating at the time that it was Mrs. Hunt's stock, and that it was desired to give sufficient margin so that there would be no inconvenience, as she was about going abroad, and also stipulating that the loan should not be disturbed. Although this testimony was contradicted the jury found a verdict for the plaintiff, which must be regarded as conclusive as to the notice to, and knowledge of, the defendant unless there is some valid and legal ground for disregarding the same. The appellant's counsel claims, that the defendant had no knowledge of the limitation by Mrs. Hunt to her agent to borrow only \$35,000; that Moller & Co. were authorized to carry and take care of the stocks and that she conferred authority upon them, and they had a right as general agents to sell the stocks or to borrow money upon them. We think this position cannot be sustained. If they had knowledge, as is established, if the fact that the loan was to be made for the specific amount of \$35,000, and for a special purpose, as was proved, the inference is the loan was made and the stocks were to be used for that purpose alone; the defendant had no right to assume that Moller & Co. had any authority to make other loans with any other object in view, certainly not without some explanation or statement that the subsequent loans were made for the benefit of Mrs. Hunt. It is not claimed that such was the case. Acting under the original agreement as to the loan there is no ground whatever for claiming that any subsequent loan was in pursuance thereof. It is true that it is said in *Merchants' Bank v. Livingston* (74 N. Y. 223), the broker "had no authority to make the loan at all," but although such may be the case, we are unable to see how this can make any difference where the authority is limited, and the limitations made known to the lender, as was the case here. Upon no sound principle can it be maintained that the lending of a specific amount of money, on collaterals to a broker or agent

under special arrangements, confers authority upon the agent or broker to make future loans which have no relation to such arrangements and no connection with the original loan. Even if it be conceded that Mrs. Hunt intrusted Moller & Co. with the securities and authorized them to make the loan in their name and upon their own obligation, and sanctioned the terms of such obligation as they might execute, inasmuch as the bank understood, as the verdict of the jury indicated, the amount of the loan which was to be made upon the securities offered, that it was for a specific purpose, and that no more than that amount was to be required on the securities, there is no ground for claiming that the stocks were subject to the general banker's lien for all moneys borrowed by the brokers from the bank. The arrangement made, and the circumstances attending it, which were known to the bank, precluded it from claiming any right to such a lien. It cannot fairly be claimed that Mrs. Hunt received the money loaned upon any such terms or with any knowledge or understanding that the securities pledged were subject to any lien of the bank for any other moneys loaned to her broker. She conferred no authority upon her agents for this purpose; she had no knowledge of any such lien beyond \$35,000, and as the bank understood the arrangement that that amount only was to be loaned on the securities, there is no valid ground upon which she should be held liable. The question whether the bank was entitled to a general lien depended upon the fact whether it had notice that Mrs. Hunt was the owner of the stocks and that they were pledged as collateral only for the loan of \$35,000. This was a question for the jury to determine upon all the evidence in the case and, therefore, the motion to dismiss the complaint upon this ground was properly denied. Plaintiff before suit brought on demanding securities tendered \$35,000 and interest, and, this being refused, tendered \$46,000, which was also refused.

The request to charge that the tender of \$46,000 was an admission that that amount and interest was a proper claim of the bank upon the stocks was properly refused. We think

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that the tender was not conclusive upon the plaintiff as admitting that the defendant had a lien upon the stocks for that amount. It was made with a view of arranging the controversy without litigation, and the principle is well established that concessions made for the purpose of securing a settlement of the controversy cannot operate to the prejudice of the party making them. Where a tender is made, for the purpose of obtaining property of the owner, sold and in the hands of the tenderee claiming to own the same, and accepted, the money paid may be recovered back. (*Briggs v. Boyd*, 56 N. Y. 289; *Scholey v. Mumford*, 60 id. 498.) Upon this principle the tender made may be regarded the same as if the money had actually been paid, and cannot be available as a defense to the plaintiff's action. Such a tender is not an estoppel, and the case of *Eaton v. Wells* (82 N. Y. 576) has, we think, no application. For the reasons last stated the request to charge, that the \$46,000 and interest should be deducted from the value of the stocks, was also properly refused.

We think it very clear that if the bank had knowledge at the time they made the loan of \$35,000 that the brokers were acting as agents for Mrs. Hunt, and that Moller had no authority as agent for Mrs. Hunt except to make the loan for that amount, the power of attorney given to the brokers, although absolute on its face, did not authorize a loan beyond the \$35,000.

The judgment should be affirmed.

The record in this case also brings up for review an appeal from an order of the General Term, affirming an order of the Special Term, denying a motion to change the place of trial. It appears from the motion papers that the plaintiff in this action resides in the county of Kings and the defendant is located in the city and county of New York; the place of trial named in the complaint is the county of Kings, and the question presented upon this appeal is whether a National bank can be sued in the Supreme Court of this State out of the county where it is located. This question involves the construction to be placed upon various provisions of the U. S.

Revised Statutes. By section 5136, subdivision 4, it is declared that a duly organized National bank shall have power: "To sue and be sued, complain and defend in any court of law and equity as fully as natural persons." By section 5198 as originally enacted it was provided, "the taking * * * a rate of interest greater than is allowed * * * shall be deemed a forfeiture of the entire interest * * *. In case the greater rate of interest has been paid, the person by whom it has been paid * * * may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred." This section was amended in 1875 by adding as follows: "That suits, actions and proceedings against any association under this title may be had in any Circuit, District or Territorial Courts of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Section 5198, *supra*, as it was before this amendment, related to actions for forfeitures and penalties for taking a greater rate of interest than is allowed by law to National banks, and there is some ground for claiming that this amendment was to be limited and confined to cases where actions were brought against National banks for penalties under the law cited. Such a construction would be consistent with the provisions of section 5136, which relates to suits brought by and against National banks. The amendment was without doubt intended to give jurisdiction to State courts, in suits for usury penalties, which previously did not exist, and was confined to the courts of the United States. (See U. S. R. S., § 711, subd. 2.) It will be noticed that the amendment in question uses the word "may," thus indicating that it was not intended to be imperative or compulsory, or in any way inconsistent with the provisions of section 5136, which declares that these banks may "sue and be sued, complain and defend in any court of law or

equity as fully as natural persons." It is true that in the construction of statutes the word "may" is sometimes construed as meaning "must," in order to carry out the intention of the framers and the object of the law. But such a construction in this case might lead to great practical inconvenience and would be evidently inconsistent with the object of the provision in question; it would confer special rights and privileges on these institutions and compel parties who had claims against them to bring suits in the location where they were situated and subject them to great expense and unnecessary trouble. This might act as a very great hardship in cases where actions might be brought in favor of one of these institutions, located at a distance from the other sued. This could never have been intended, and the evident purpose of the amendment was to give authority to sue these institutions in the State court, if it did not previously exist under section 5136.

We think it is also a legitimate construction of the provision of the act that the words restricting the bringing of suits were confined to local courts, such as county courts and municipal courts, and not to the Supreme Court of the State, and that a party living in a county at a distance from a National bank has a right to bring an action in his own county against it for any lawful claim, subject to an application to change the place of trial for the convenience of witnesses in accordance with the practice of the court. The rule contended for by the appellant's counsel, that "if an affirmative statute which is introductive of a new law directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner," has no application to the case presented by the appeal-book, and to the statute intended to regulate the proceedings of courts in reference to suits which it might be necessary to institute against corporations. It must be borne in mind that the statute in question was for the benefit of parties in the prosecution of their rights against banking institutions in the courts of the State where they were located, and was not an imperative provision for the purpose of restricting or limiting such right. The case of

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Hagadorn v. Rauw (72 N. Y. 586) is not in point, and the rule there laid down relates to the statute pertaining to public officers, which imposes duties upon them, which they have failed to perform, and is not applicable to this case. The case of *Casey v. Adams* (102 U. S. 66), cited by the appellant's counsel, does not aid him. The question there was a local question and the plea was to the jurisdiction. The effect of the statute on transitory actions was not expounded. It is, we think, adverse to the position of the appellant's counsel. The decisions of the courts of this State are in conformity to the views we have expressed, and language in statutes of a similar character is held to be permissive only. (*Cooke v. State Nat. B'k*, 52 N. Y. 109; *Robinson v. Nat. B'k. of Newberne*, 81 id. 387; 37 Am. Rep. 508.)

For the reasons stated the order should be affirmed.

All concur.

Judgment and order affirmed.

ADELAIDE L. POST et al., Appellants, v. FRANCIS O. MASON et al., Executors, etc., Respondents.

Where a will executed by one having full testamentary capacity, and duly admitted to probate, contained a legacy to the draughtsman, an attorney, who, at the time of the execution of the will, was, and for a long time previous had been, the counsel of the testator, held, that this alone did not raise a presumption, in aid of one seeking to overthrow the will, that the influence of the attorney was unduly exercised, nor did it, in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled; that it was for the plaintiff, therefore, in an action brought to set aside the will to give some other evidence tending to show fraud or undue influence.

A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in such an action, may, "in the discretion of the court which reviews it, be disregarded, if it is of opinion, that substantial justice does not require that a new trial should be granted." (Code of Civil Procedure, § 1003.)

A court of equity has no jurisdiction to set aside a will of personal prop-

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erty, which has been duly admitted to probate, because of fraud or undue influence; the probate is conclusive. (3 R. S. 61, § 29.)

Nor can executors, as to a gift to them in a will so admitted to probate, be charged by a court of equity, as trustees of the next of kin, on the ground that the gift was obtained by fraud.

Segrave v. Kirwan (1 Beatty, 157), distinguished

(Argued February 1, 1883; decided March 6, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made December 30, 1881, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term, and affirmed an order denying a motion for a new trial. (Reported below, 26 Hun, 187.)

The nature of the action and the material facts are stated in the opinion.

William F. Cogswell for appellants. An attorney claiming under a transaction with his client is bound to show that his client had independent advice as to the effect of his transaction. (*Whitehead v. Kennedy*, 69 N. Y. 462, 466; *Ford v. Harrington*, 16 id. 285; *Nesbit v. Lockman*, 34 id. 167; *Berrien v. McLane*, 1 Hoff. Ch. 421-428; *Mason v. Ring*, 3 Abb. Dec. 210.) This rule is applicable with quite as much force to testamentary transactions as to transactions between parties directly. (*Nexsen v. Nexsen*, 2 Keyes, 229; *Morris v. Stokes*, 24 Ga. 552-575; *Barry v. Battin*, 1 Curteis, 637; *Wyatt v. Ingraham*, 3 Hagg. Eccl. 466; 5 Eng. Eccl. 183; *Coffin v. Coffin*, 23 N. Y. 9.) A court of equity, in case any gift in a will was obtained by fraud, actual or constructive, and especially where the solicitor of the testator prepares the will, and makes himself residuary legatee, will declare the party obtaining such gift or legacy, a trustee for the next of kin. (*Marriot v. Marriot*, 1 Strange, 666, 673; *Barnesley v. Powel*, 1 Ves. Sr. 284, 285; *Hindson v. Weatherill*, 1 S. & G. 614; *Seagrave v. Kirwan*, 1 Beatty, 157; *Gibson v. Jeyes*, 6 Ves. 266; *Bulkley v. Milford*, 2 O. & F. 102; *Gingell v. Horne*,

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9 Sim. 539; 5 De Gex, M. & G. 301; Mitford's Ch. Pl. 257; Fonbl. Eq. 68 [4th Am. ed. 76], note *u*; *Maundy v. Maundy*, 1 Rep. in Ch. 23; *Well v. Thornagh*, Prec. Ch. 123; *Goss v. Tracy*, 1 P. Wms. 287; 2 Vern. 700; *Roberts v. Wynne*, 1 Rep. in Ch. 236; *Archer v. Moss*, 2 Vern. 8; *Herbert v. Lownes*, 1 Rep. in Ch. 22; *Thynn v. Thynn*, 1 Vern. 296; *Devenish v. Barnes*, Prec. Ch. 3; *Barnesley v. Powel*, 1 Ves. Sr. 287; 2 Dessaus. Ch. 356.)

Geo. B. Bradley for respondents. An error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may, in the discretion of the court which reviews it, be disregarded, if the court is of opinion that substantial justice does not require that a new trial should be granted. (Code of Civil Pro., § 1003; *Lansing v. Russell*, 2 Comst. 563; *Forrest v. Forrest*, 25 N. Y. 501, 510; *Clapp v. Fullerton*, 34 id. 190, 195-196; *Foots v. Beecher*, 78 id. 157, 158; *Tomlinson v. Miller*, 3 Keyes, 520; *Apthorp v. Comstock*, 2 Paige, 487.) The practice in respect to disposition of feigned issues so far as applicable still prevails under the provisions of the Code. (*Vermelia v. Palmer*, 52 N. Y. 471, 474; *Snell v. Loucks*, 12 Barb. 185, 387-9; *Cole v. Tiff*, 47 N. Y. 121; *Thurber v. Chambers*, 4 Hun, 727; *Hegeman v. Cantrell*, 50 How. 189; *Hatch v. Peugnet*, 64 Barb. 194-195.) The motion for a new trial in the court below was addressed to the discretion of the court there. (*Lansing v. Russell*, 2 Comst. 563; *Cole v. Tiff*, 47 N. Y. 121; *Forrest v. Forrest*, 25 id. 501, 510; *Hegeman v. Cantrell*, 8 J. & S. 386; *Olayton v. Yarrington*, 33 Barb. 144; *Clark v. Brooks*, 2 Abb. Ct. of App. Dec. 558-9.) The burden was on the plaintiffs to show in the first instance undue influence, either by direct proof or by circumstances from which an inference of it might arise. (*Tyler v. Gardner*, 35 N. Y. 559, 594.) There is no rigorous rule of law that presumes undue influence on the part of the draughtsman of a will because he is a beneficiary by it, although he has also been the legal adviser of the testator. (*Coffin v. Coffin*, 23 N. Y. 9, 13; *Tyler v.*

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Gardner, 35 id. 559; *Kinne v. Johnson*, 60 Barb. 70, 79; *Mark v. McGlynn*, 88 N. Y. 371; *Buttin v. Barry*, 1 Curteis' Ecc. 637; 6 Eng. Ecc. 417; approved in 23 N. Y. 13; *Paine v. Hall*, 18 Ves. 475; *Hudson v. Weatherill*, 5 De Gex, M. & G. 301, 311, 313; *Barry v. Butlin*, 2 Moore's Privy Council, 480; *Parfitt v. Lawless*, 2 Probate and Divorce, 462; S. C., 4 Eng. Rep. [Moak] 687; *Russell v. Russell's Adm'rs*, 3 Houst. [Del.] 103; *Nexsen v. Nexsen*, 3 Abb. Ct. of App. Dec. 360, 364; *Cudney v. Cudney*, 68 N. Y. 148, 152; *Children's Aid Soc. v. Loveridge*, 70 id. 394.) The decree of the surrogate, admitting the will to probate, is conclusive evidence of the validity of the will, and cannot be attacked in that respect in this court. (2 R. S. 61, § 29; *Vanderpoel v. Van Valkenburgh*, 2 Seld. 190; *Muer v. Trustees, etc.*, 3 Barb. Ch. 477; *Bogardus v. Clark*, 4 Paige, 623, 625-6; *Colton v. Ross*, 2 id. 396; *Burger v. Hill*, 1 Bradf. 371-3; *Jourden v. Mier*, 31 Mo. 40; *Crippen v. Dexter*, 13 Gray, 330; *Broderick's Will Case*, 21 Wall. 503; 3 Redfield on Wills, 58-63; *In re Kellum*, 50 N. Y. 298.) That probate is conclusive evidence of validity of the will in respect to the clause in question. (2 R. S. 61, § 29; *Vanderpoel v. Van Valkenburgh*, 2 Seld. 190; *In re Kellum*, 50 N. Y. 299; *Colton v. Ross*, 3 Paige, 396, 398; *Booth v. Ketchum*, 7 Hun, 255, 257.) The question of validity of wills of personal property is not the subject of jurisdiction of a court of equity. The probate court has exclusive jurisdiction of that subject. (1 Story's Eq. Jur., § 184; *Meluish v. Milton*, 3 Ch. & Div. 27; S. C., 17 Eng. Rep. [Moak] 771; *Allen v. McPherson*, 1 H. of L. Cas. 191; affirming, 1 Phillips' Ch. 133; *Herrick v. Brunsby*, 7 Brown's P. C. 437; *Ex parte Fearon*, 5 Ves. 647; *Colton v. Ross*, 2 Paige, 396, 398; *Clark v. Fisher*, 1 id. 171, 176; *Heyer v. Berger*, 1 Hoffm. 10, 11; *Booth v. Ketchum*, 7 Hun, 255, 257; *Burger v. Hill*, 1 Bradf. 371-2; *Broderick's Will Case*, 21 Wall. 503; *California v. Glynn*, 20 Cal. 233, 266; *Gaines v. Chew*, 2 How. [U. S.] 645; 3 Redfield on Wills, 58-60.) It is not of fraud on the testator, but of fraud after his death in procuring decree of probate, etc., that a court

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of equity may entertain jurisdiction. (*Meadows v. Duchess of Kingston*, Ambl. 756, 762; *Barnsley v. Powell*, 1 Ves. Sr. 284; *Allen v. McPherson*, 1 Phillips' Ch. 133; 1 H. of L. Cas. 191; *Broderick's Will*, 21 Wall. 511; *Chapman v. Montgomery*, 63 N. Y. 231; *Given v. Hilton*, 95 U. S. 591.)

DANFORTH, J. John Post made his will on the 13th day of September, 1874, and thereby, after giving to each child \$40,000, to his wife the use for life of \$40,000, and the homestead, with remainder to his children, \$20,000 to the Ontario Orphan Asylum, to a nephew \$3,000, smaller sums to his brother, to a clergyman and others, to his wife's mother for life a certain house and lot, with remainder to his heirs, provided for the improvement of his father's burial place and the erection of certain monuments, and then appointed Alonzo Wynkoop and Bradley Wynkoop, both his cousins, and Francis O. Mason, his executors and trustees for certain purposes, and gave to them in equal shares the remainder of his estate, amounting, as it now appears, to \$17,513.66 personal property. He died on the 28th of September, 1874, leaving an estate of the value of about \$200,000, and on the 24th of October, 1874, probate of the will was duly granted by the surrogate of Ontario county. This action was commenced in May, 1878, by the plaintiffs, as the widow, heirs, and next of kin of the testator, against the defendants, as executors and residuary legatees, praying that the probate of the alleged will be vacated, that the instrument be declared not to be the last will and testament of John Post, or, failing in these respects, that the plaintiffs be declared to be the owners of the residuary estate, and the defendants adjudged to hold the same as trustees for them.

The defendants, by answer, put in issue the case made by the complaint, and questions framed thereon were, on submission to the jury, answered by them in favor of the defendants. The plaintiffs then applied to the Special Term for a new trial upon exceptions taken to the charge of the trial judge, and his refusal to charge as requested by their counsel. This was denied. The court, thereupon, approved the verdict, and after

findings of fact and law, on all points adversely to the plaintiffs' case, ordered judgment, dismissing the complaint.

We find no error in that decision. *First*, as to the charge; so far as material to the proposition argued by counsel, the complaint alleged that Mason was a lawyer, and at the death of the testator, and for one or more years before that time, his friend and confidential attorney and counselor; that he wrote the will in question, and taking advantage of that relation, "improperly and illegally, if not fraudulently, induced" the testator to execute it in ignorance of its contents and effect; that the instrument was never read over to him, and he was never fully informed of its contents; that its probate was fraudulently procured at a time when the children were under the age of twenty-one years, and the widow uninformed of its contents. The answer of the defendants puts in issue every allegation tending to exhibit fraud or contrivance either as concerned the will or its probate, and in the most satisfactory manner details the various consultations which led to the will, and the intelligent instructions given by the testator for its preparation. Omitting immaterial questions, those framed for the jury were: *Fourth*, Was John Post, at the time he made and executed the will, of sound and disposing mind and memory, and competent to make and execute it? *Fifth*, Was it read over by or to him at the time of, or before its execution, and did he understand it and all its provisions? *Sixth*, Was its execution procured by undue influence? *Seventh*, Was the probate fraudulently obtained? *Eighth*, Was the plaintiff, Adelaide, informed of the contents of the will, and if so, when? *Ninth*, Did either of the defendants intentionally prevent either of the plaintiffs from becoming informed of the contents of the will? Upon the trial of these questions before the jury, it was conceded that the signature to the will was that of the testator; that the statutory formalities relating to its execution were complied with, and that it was admitted to probate at the time above stated. Witnesses were examined by the plaintiffs to establish, on their part, the questions in issue. They were answered by the defendants. In his charge to the jury the

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learned judge dwelt upon each proposition involved, in a manner satisfactory to the plaintiffs, except as I shall hereafter state. Upon the question of undue influence he said, upon the relation of client and counsel, "The law fastens a peculiar confidence," and all that is necessary to make the influence of the latter undue is that "they should use the confidence reposed in them, unfairly and dishonestly to operate as a moral coercion upon the testator, and thus induce him to do what he otherwise would not have done." "The law," he said, "treats the exercising of this unfair influence as a fraud, but the law does not presume that a fraud has been committed in this or any other case. If a man clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will at all." "It has this effect, however, if there is any evidence produced, tending to establish the fact that there was this undue influence, the law looks with more jealousy upon it than in other cases, it requires less evidence to find undue influence, when the will gives a legacy to the counsel, than if it was between persons not holding the relation I have adverted to." He added, "It is incumbent upon the plaintiffs in this case to prove some circumstances of suspicion, some evidence of an unfair exercise of the influence which Mr. Mason had over the testator, and if they have furnished such evidence it is incumbent upon the defendants to show you some evidence that no undue influence was exercised." To this clause the plaintiffs' counsel excepted, and asked the court to charge: "That this will having been written by Mr. Mason, who is a legatee, and is shown to have been for years before the will was made the legal adviser of Mr. Post, the same is presumed to be fraudulent; that the law itself, without any evidence at all, presumes that it was obtained by fraud; that the presumption was against the will until it was overborne by satisfactory evidence." The court declined, and the plaintiff excepted. These exceptions are to be considered together, and they present the question whether a will executed by one having full testamentary capacity is, as matter of law, to be deemed fraudulent for

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the simple reason that it contains a provision in favor of the draughtsman who was and had been the counsel of the testator. This is apparent when we read the charge and the request together. The court said: "If a man clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will," and on the other hand, the appellant says: "The law itself, without any evidence at all, presumes it was obtained by fraud."

In *Hindson v. Weatherill* (5 De Gex, M. & G. 301), there is a case somewhat similar in its facts, and as viewed by the court, presenting the same question. The plaintiff succeeded before the vice-chancellor, on the ground that a solicitor of a testator, to whom the testator had made gifts, was a trustee of those gifts for the testator's heir at law and next of kin, but upon appeal the court thought otherwise, and deemed it unnecessary to say how the matter would have stood if undue influence or any unfair dealing had been established against him, for no such thing was done. The solicitor, they say, "prepared his client's will, containing dispositions in his own favor," adding, "there begins and ends the case as I view it. But a case so beginning and so ending does not take away the right, either legally or equitably, of a solicitor to be, for his own benefit, a devisee or legatee." This touches the very point as presented to the trial judge, and to the same effect are *Coffin v. Coffin* (23 N. Y. 9), and *Nexsen v. Nexsen* (2 Keyes, 229). The proposition of the plaintiff excluded every circumstance but the occupation of the legatee, Mason, and his relation to the testator and the will. If acceded to it would have taken from the jury even the contents of that instrument, forbidden them to inquire whether the testator himself knew its provisions, or to consider the amount of the legacy, its proportion to the whole body of the estate, its relation to bequests to other parties, and those persons who were the natural objects of the testator's bounty, and other circumstances which had been detailed in evidence. I do not think it necessary to inquire whether such rule might apply to a controversy between an

attorney and his client, where the former was seeking to enforce an obligation against the latter, or to an issue made upon the probate of a will under which the attorney was the principal beneficiary. There is certainly no rule of law which says an attorney shall not buy of, or contract with his client; there is only the doctrine that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, and throw upon the attorney the onus of proving that the bargain is, generally speaking, as good as any that could have been obtained from any other purchaser, or in other words, that the bargain was a fair one. Then as to testamentary dispositions, as one does not, by becoming an attorney, lose the capacity to contract, neither is he thereby rendered incapable of taking as legatee, even under a will drawn by himself. That circumstance, if probate was opposed, might in some cases require something more than the usual formal proof of a due execution of the instrument, not because fraud was presumed, but because it might be rendered more probable than in cases where the directions of the testator followed the lines of relationship. *Coffin v. Coffin* and *Newsen v. Newsen* (*supra*), go no further. In the first, the fact that the draughtsman of the will was appointed executor and legatee was said to be suspicious only in connection with other circumstances indicative of fraud or undue influence, and in the other, although from an estate of \$15,000, the draughtsman of the will, who was also the testator's agent, was appointed to receive all but \$3,000, and so became the principal beneficiary under it, the court, citing *Coffin v. Coffin* (*supra*), held the same way. Both cases came up on appeal from surrogates' decisions on proceedings for probate, and require from the proponent in such a case testimony of a clear and satisfactory character. In *Coffin v. Coffin*, the court sum up the matter in the language of Baron PARKE, in *Barry v. Butlin* (1 Curteis' Ecc. 637), and declare that "all that can be truly said is, that if a person, whether an attorney or not, prepares a will with a legacy to himself, it is at most, a suspicious circumstance, of more or less weight according to the facts of each particular case, in some of no

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weight at all * * * * * varying according to circumstances, for instance the *quantum* of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies."

The relation of attorney and draughtsman no doubt gave in the case before us the opportunity for influence, and self-interest might supply a motive to unduly exert it, but its exercise cannot be presumed in aid of those who seek to overthrow a will already established by the judgment of a competent tribunal, rendered in proceedings to which the plaintiffs were themselves parties, nor in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently controlled. Such indeed seems to have been the theory on which the action was brought, for the complaint not only alleges the confidential relation between Mason and the testator, but avers weakness and inability on his part, ignorance of the contents of the will, and advantage taken of these circumstances by the attorney to procure a bequest for his own benefit. In view, therefore, of the verdict of the jury and the findings of the court, we might dismiss the case. They have not only declared that the testator was of sound and disposing mind, competent to make a will and under no restraint or undue influence, but that before execution the will was read and its provisions understood by him, and also that fraud was not practiced upon the testator nor upon the plaintiffs, to obtain probate, and have thus taken away every ground of relief, even if the Supreme Court had power to grant it. A somewhat more general question has, however, been argued for the appellants. The learned counsel insists that "the burden of proof is all there is of this controversy," and as the judge charged the jury that upon all the questions presented to them, "the plaintiffs held the affirmative," and again, that "the burden of proof is upon the plaintiffs to establish, by evidence, every allegation of fraud, and in the absence of such evidence, the issue must be found in favor of the defendants," there was error. Several propositions were thus involved. The questions submitted to the jury related severally to the condition of mind of the tes-

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tator, influence exerted upon him, whether probate was obtained by fraud, whether Mrs. Post learned the contents of the will within a given time, and whether either, and if either, which of the defendants prevented her from so doing. Upon some of these there could be no doubt whatever as to the burden of proof. The plaintiff's moving to set aside the will and its probate must do something more than call the defendants into court, and so they thought at the trial. For they opened the case to the jury, and upon every question took the affirmative, giving such evidence as they could. Even assuming, therefore, that the exceptions were pointed enough to call the mind of the judge to any particular error, we think his instructions were right. But if otherwise, it would not follow that our decision should go for the appellants. Applications for new trials of questions submitted by a court of equity are governed by different principles from those which prevail on similar applications in a court of law. The object of the trial is attained, when the court is satisfied that justice has been done, and in such a case a new trial will not be granted, even for misdirection to the jury (*Head v. Head*, 1 Turner & Russell, 138), unless the error was vital or important. (*Vermilyea v. Palmer*, 52 N. Y. 471.) There are many cases to the same effect, but in this State, the rule is now statutory, and any error in the ruling or direction of the judge upon the trial may, in the discretion of the court which reviews it, be disregarded, if it "is of opinion that substantial justice does not require that a new trial should be granted." (Code of Civil Procedure, § 1008.) Upon this point neither the judge at Special Term nor the judges of General Term have entertained a doubt. Neither can we. Upon the question of fraud or undue influence, there is no evidence. The plaintiff's case stands, if at all, upon the single fact that a lawyer, the draughtsman of the will, was one of three residuary legatees, and thus receives a benefit. The proof is abundant that on the part of the testator there was adequate capacity, testamentary intention, and a due execution of the will, with full knowledge of its contents. This is enough. The record fur-

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nishes no reason for defeating the plain wishes of the testator. Aside from these considerations, however, it is apparent that so far as any question here is concerned, the will is to be regarded as one relating to personal property only, and we are of opinion that its probate by the surrogate must be deemed conclusive. As to this the statute is explicit. (2 R. S., tit. 1, part 2, chap. 6, art. 2, § 29, p. 61; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *In the Matter of Proving the Will of Kellum*, 50 id. 298.)

It is, however, urged as ground for the interference of a court of equity, notwithstanding probate of the will, that the executors may, as to the gift to them, be charged as trustees for the next of kin, if that gift was obtained by fraud, actual or constructive. Although the foundation for this contention is taken away by the decision of the other points, something should be said as to the proposition itself. Authority for it is not gathered from the decisions of the courts of this State, nor are we informed how it can stand in face of the statute (*supra*) which makes such probate conclusive. The whole, and each part of the will was before the surrogate, and allegations attributing any portion of it or any of its provisions to fraudulent practices, were then competent. They were made or might have been made, and in either event were embraced in his decision. If established, the will, or so much of it as was affected by the fraud, would have been rejected, and the property now claimed would have found its way by force of the statute of distributions to those entitled to it. We are, however, referred by the appellants' counsel to cases from the English courts, in support of his position. We think they are insufficient. Most of them (*Marriot v. Marriot*, 1 Str. 666; *Segrave v. Kirwan*, 1 Beatty, 157; *Bulkley v. Wilford*, 2 Clark & Fin. 102; *Barnesly v. Povel*, 1 Ves. Sen. 287) are cited and commented on in *Allen v. McPherson* (1 House of Lords Cases, 191), where after probate of a will and codicils in the Ecclesiastical Court, a bill was filed by one R. A. in Chancery, stating that by the will and codicils the testator gave him large bequests which he revoked by the final codicil, and alleged that the testator had

executed the last codicil when his faculties were impaired by age and disease, and under undue influence of the residuary legatee, and false representations respecting R. A.'s character, and moreover that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument, and prayed that the executor or residuary legatee might be declared trustees or trustee to the amount of the revoked bequest. Upon demurrer, the court, with these and other cases before it, held that the Court of Chancery had no jurisdiction in the matter, and this was upon the ground that the Ecclesiastical Court had jurisdiction and might have refused probate, citing various instances where those courts had so applied the doctrine, and as to cases in which a court of equity had declared a legatee or executor to be a trustee for other persons, show that they presented questions of construction, or were cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate remedy, and were not cases of fraud. This decision was made in 1847, and in a much later case (*Meluish v. Milton*, L. R., 3 Ch. Div. 27, decided in 1876) it was followed by the Court of Chancery, where the heir-at-law and next of kin sought to have the executrix, who was also legatee, declared a trustee of the property for him. The relief sought was denied upon the ground that as the Court of Chancery could not set aside probate of a will of personal property, it could not make a legatee trustee for another person, on the ground of fraud, as that would be doing indirectly what the law will not allow to be done directly, and the court held that the exclusive jurisdiction of the Court of Probate in such cases is supported by convenience as well as by authority. So there are English cases where as the law stood, if a testator did not dispose of his residuary estate, the executors took a beneficial interest in it unless a contrary intention was expressed, and a court of equity was astute to find a trust for the heir or next of kin. *Segrave v. Kirwan* (1 Beatty. 157), so largely relied on by the appellants, was one of those cases. It was not there the in-

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tention of the testator to give the draughtsman any thing more than the office of executor, but no residuary legatee was named, and he insisted that he was entitled to the residue of the personal estate, and so the law was. But it appeared that at the time he drew the will, he was not — nor was the testator — aware that under the dispositions and omissions of the will, he would be entitled to the residue; and the court charged the attorney as trustee for the next of kin, upon the ground that he should be deemed to have known the law, and having failed to instruct the testator in regard to it, should reap no advantage from his actual ignorance. But even in England the necessity for this interference was removed by statute (11 Geo. 4, and 1 Will. 4, chap. 40; Statutes of Great Britain and Ireland, vol. 12, part 1, p. 144), and we are cited to no case in this State where a court of equity has exercised such jurisdiction as the plaintiffs now invoke.

Upon all grounds, therefore, we think the judgment of the Supreme Court should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PROSPECT PARK AND CONEY ISLAND RAILROAD COMPANY,
Appellant, v. S. STRYKER WILLIAMSON et al., Respondents.

Lands once taken for a public use, pursuant to law, under the right of eminent domain, cannot, under general laws, and without special authority from the legislature, be appropriated, by proceedings *in invitum*, to a different public use.

Where a railroad corporation, by proceedings under the General Railroad Act (§ 17, chap. 382, Laws of 1854), acquired title to lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, putting in issue the necessity of the taking of all the lands sought to be condemned, *held*, that it was not open for the officials of the town to question, collaterally, the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway.

In an action by the railroad corporation to restrain the highway commissioners of the town from opening a highway over the lands so acquired

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it appeared that plaintiff's railroad was constructed simply as an excursion road, for the conveyance of passengers to the sea beach. The land acquired consisted of several acres lying at the terminus of the railroad, on the sea shore. The corporation erected thereon a depot, waiting-room, car-houses, restaurant, track yard and other structures used in the actual operation of the road, leaving a space between the depot building and the beach of about seven hundred feet in length, across which the highway was sought to be laid out; this was occupied by railroad tracks running to high-water mark, plank walks for passengers, and by various structures for their accommodation, convenience and pleasure. During the summer season plaintiff conveys, daily, from ten to fifteen thousand people each way over its road, and runs about one hundred and twenty passenger trains per day. It also appeared that the strip of land was, at times, insufficient for the use of passengers, and was so crowded with people that it was difficult to walk across it; that the proposed highway would deprive the plaintiff of a large part of this area, and would expose its passengers, a large portion of whom were women and children, to danger from passing vehicles. *Held*, that a finding that the laying out of the highway would not interfere with the property occupied by the company for railroad purposes, or cause damage to its business, was not justified; that the erection on the land of decorations and structures for amusement, although they might be deemed superfluous, was not an abandonment by the company of the uses for which it acquired the premises.

It seems that if the purposes for which the structures upon the land were used were so foreign to the purpose for which it was acquired, or so reprehensible as to produce a forfeiture of the rights of the company, it did not lie with the highway commissioners to enforce it.

The authority given by the General Railroad Act (§ 1, chap. 62, Laws of 1853) to construct highways across railroad tracks does not extend to lands taken for depot purposes.

P. P. & C. I. R. R. Co. v. Williamson (24 Hun, 216), reversed.

(Argued June 9, 1882; decided March 18, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 15, 1881, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 24 Hun, 216.)

This action was brought to restrain defendants, the commissioners of highways of the town of Gravesend, from opening and constructing a public highway at Coney Island, across lands of the plaintiff.

The material facts are stated in the opinion.

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John H. Bergen for appellant. Chapter 365 of the Laws of 1880 applies to the lands in question, and forbids the opening the highway through said lands without the consent of the plaintiff. (*Town of Duaneburgh v. Jenkins*, 57 N. Y. 177.) This land having been once taken for a public use under the right of eminent domain, it cannot be taken again or appropriated for another, or different public use, without an express act of the legislature for that purpose. (*In re A. & B. R. R.*, 53 N. Y. 574; *In re R. Water Comm'rs*, 66 id. 413; *In re Buffalo*, 68 id. 167; *Mills on Eminent Domain*, chap. 5, § 45; *In re N. Y. & B. B. R. R. Co., etc.*, Gen Term, 2d Dept., Feby., 1880.) The highway commissioners have no right to open highways through such lands as these in question without the consent of the owner. (*Clark v. Phelps*, 4 Cow. 190; *Carris v. Comm'rs of Waterloo*, 2 Hill, 443; *Laws of 1880*, chap. 365.) A highway cannot be laid out over grounds acquired by a railroad for depot purposes necessary for its use, and such act will be restrained by injunction. (*A. N. R. R. Co. v. Brownell*, 24 N. Y. 345, 351; 6 Paige, 87; *B. & A. R. R. Co. v. Greenbush*, 52 N. Y. 510; *People v. Kingman*, 24 id. 559-562; *Miller v. Brown*, 56 id. 383.) Plaintiff's road being an excursion road its necessities for land are not confined to mere depot buildings and to the ground on which the superstructure of its tracks are laid, but it is necessary that it have land on which structures for the accommodation of the passengers when they are landed from its cars, can be built, that they may be sheltered from storms and have free access to the ocean beach. (*Matter of N. Y. C. & H. R. R. R. Co.*, 77 N. Y. 262; *R. & S. R. R. v. Davis*, 43 id. 144, 145, 146; *In re N. Y. & H. R. R. Co. v. Kip*, 46 id. 546, 551, 553, 554, 555; *In re N. Y. C. R. R.*, 49 id. 419; *B'klyn Park Comm'rs v. Armstrong* 45 id. 243; *People v. Hayden*, 6 Hill, 359; *Niagara Falls R. R. v. Hotchkiss*, 16 Barb. 270; *Crowner v. Watertown & R. R. Co.*, 9 How. 457; 104 Mass. 1; *Matter of N. Y. C. R. R. Co.*, 66 N. Y. 409; *Brown v. Winnisimmet Co.*, 11 Allen, 326; *Green's Brice's Ultra Vires*, 67, 86, 89, 99, 100; *Flanagan*

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v. *Gt. W. Ry. Co.*, L. R., 7 Eq. 116; *Regby v. Gt. W. Ry. Co.*, 4 R. C. 175.) The question as to whether the land in question and the whole of it is necessary for the purposes of the road is *res adjudicata* by the proceedings to acquire the land. (*Steinback v. Relief Ins. Co.*, 77 N. Y. 498, 501.) The act of 1830 was passed when such avenues as the one in question were not thought of, and it does not apply to or cover the case of Surf avenue. (*A. N. R. R. Co. v. Brownell*, 24 N. Y. 345, 351; 6 Paige's Ch. 87.) The proposed highway will destroy erections in the company's yard and grounds, and is, therefore, prohibited by the act of 1853. (*A. & N. R. R. Co. v. Brownell*, 24 N. Y. 345; *People v. Kingman*, id. 559.) Chapter 365, Laws of 1880, was applicable to the land in question and was the law which governed this case on the trial. (*Town of Duaneburgh v. Jenkins*, 57 N. Y. 177, 191-2.)

Samuel D. Morris for respondent. The effect of chapter 670, Laws of 1869, is simply to restrict the commissioners of highways in the laying out of highways in the town of Gravesend by requiring them to conform with the plan adopted by the commissioners appointed by said act. The effect of chapter 482, section 9, Laws of 1875, is to authorize the board of supervisors to remove that restriction; it did not authorize the said board to lay out or change highways. (*Phillips v. Schumacker*, 10 Hun, 405.) Where two statutes can stand together, the latter will not be held to repeal the former unless the legislative intent to repeal be manifest. (*People v. Palmer*, 52 N. Y. 83.) A statute only operates as a repeal of a former one to the extent that the two are repugnant. (*Mongeon v. People*, 55 N. Y. 613; *S. C.*, 2 S. C. 128; *People v. Deming*, 1 Hilt. 271; *S. C.*, 13 How. Pr. 441; *Werner v. German Svgs B'k*, 2 Daly, 406.) A statute will not be held to be repealed by implication. (*Mitchell v. Halsey*, 15 Wend. 241; *Bowen v. Lease*, 5 Hill, 221; *People v. Deming*, 1 Hilt. 271; *S. C.*, 13 How. Pr. 441; *Cohoes v. Moran*, 25 id. 385.) The courts will not give a retroactive effect to a statute, unless such be already the intention of the legislature. (*Jarvis v. Jarvis*, 3 Edw. Ch.

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462; *Aspinwall v. Pirnie*, 4 id. 410; *People v. Carnal*, 6 N. Y. 473; *Sanford v. Bennett*, 24 id. 20; *People v. Sup'rs of Columbia*, 43 id. 130; *Astor v. N. Y.*, 62 id. 567; *Randall v. Sackett*, 56 How. 225; *N. Y. & O. R. R. v. Van Horn*, 57 N. Y. 473.) Even a remedial statute will not be construed to act retrospectively, unless the intent of the legislature be clear. (*People v. Sup'rs of Ulster*, 63 Barb. 83.) An amendment to a statute has no more retroactive effect than an original act. (*Benton v. Wickwire*, 54 N. Y. 226.) A vested right to damages for the improvement of a public highway cannot be diverted by a repeal of the act under which they were assessed. (*People v. Sup'rs of Westchester*, 4 Barb. 64.) A statute will not be construed to operate retrospectively, so as to take away a vested right. (*Dash v. Van Kleeck*, 7 Johns. 477; *Van Valkenburg v. Torrey*, 7 Cow. 252; *Sayre v. Wisner*, 8 Wend. 661; *Van Rensselaer v. Livingston*, 12 id. 490; *Ward v. Killo*, id. 137; *People v. Supdt. of Seneca Co.*, 3 Hill, 116; *Quackenbush v. Danks*, 1 Den. 128; *S. C.*, 1 N. Y. 129; *Wood v. Oakley*, 11 Paige, 400; *S. C.*, 4 Edw. Ch. 562; *Jarvis v. Jarvis*, 3 id. 462; *Calkins v. Calkins*, 3 Barb. 305; *McMannis v. Butler*, 49 id. 176; *Quinn v. N. Y.*, 63 id. 595.) A statute will not be construed to affect pending proceedings unless so expressed. (*Roosevelt v. Kellogg*, 20 Johns. 208; *Wood v. Oakley*, 11 Paige, 400; *Hyer v. Van Valkenburgh*, 8 Cow. 260; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Le Wall v. Grigg*, 9 N. Y. Leg. Obs. 314; *Dunbar v. Duffy*, 11 id. 349; *N. Y. v. Schermerhorn* 1 N. Y. 423; *Spaulding v. Kingsland*, id. 426; *Butler v. Miller*, id. 428; *Syme v. Ward*, id. 531; *Rice v. Floyd*, id. 608; *Tilley v. Phillips*, id. 610; *Thompson v. Blanchard*, 3 How. Pr. 399; *S. C.*, 4 id. 260; *Farmers' L. & T. Co. v. Carroll*, 2 N. Y. 566; *Dunham v. Watkins*, 12 id. 566; *Ex parte Eager*, 46 id. 100; *S. C.*, 58 Barb. 557; *Ex parte Remsen*, 59 id. 317.) The construction of the highway across the land described in the complaint does not violate the rule that land already devoted to a public use cannot be taken under general statutes by the right of eminent domain for another public use. (*Sixth Ave. R. R. Co. v. Corr*,

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72 N. Y. 330; *In re Rochester Water Com.*, 66 id. 413; *N. Y. C., etc., R. R. Co. v. Met. Gas Co.*, 63 id. 326; *Morris R. R. Co. v. Central R. R.*, 81 N. J. L. 205; *Peoria R. R. v. R. R.*, 66 Ill. 174; *Oregon R. R. v. Bailey*, 3 Oregon, 164; *Mills on Eminent Domain*, § 47.) A railroad cannot condemn land and then adapt the same to the use of tenants, and rent the same. (*Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Brooklyn*, 68 id. 1; *Proprietors, etc., v. Nashua R. R.*, 104 Mass. 1; 6 Am. Rep. 181; *Whitbeck v. Cook*, 18 Johns. 483; *Hooker v. Utica Turnpike*, 12 Wend. 371; *Mills on Eminent Domain*, § 57.) The claim made by the plaintiff that the land in question is used for the purposes of its corporation, and that it is its duty to erect buildings and structures for the amusement and attraction of its patrons, and furnish a place for them to sit and walk about is untenable. (*Rensselaer R. R. v. Davis*, 43 N. Y. 137; *Eldridge v. Smith*, 34 Vt. 484; *State v. Mansfield*, 23 N. J. L. 510; *Nashville R. R. v. Cowardin*, 11 Humph. 348; *Hamilton v. Annapolis R. R.*, 1 Md. 553; *N. Y., etc., R. R. v. Gunnison*, 1 Hun, 496; *Mills on Eminent Domain*, § 59.) An injunction is not the proper remedy in a case where the commissioners of highways would have the right to lay out a highway, but fail to acquire jurisdiction, or where their proceedings are irregular. (*A. N. R. R. v. Brownell*, 24 N. Y. 345; *Hyatt v. Bates*, 35 Barb. 308; *Bean v. Pettingill*, 2 Abb. [N. S.] 59; *McGuire v. Palmer*, 5 Robt. 607; *Liebach v. McDonald*, 21 How. 224; *Kipp v. N. Y. & H. R. R.*, 67 N. Y. 227.) A highway may be constructed across railroad tracks. (Laws of 1853, chap. 62, § 1; *A. R. R. v. Brownell*, 24 N. Y. 345; *Mohawk & H. R. R. v. Archer*, 6 Paige, 83.)

RAPALLO, J. The land through which the defendants propose to open the highway in question, was formerly the property of the town of Gravesend, and was in the year 1876 acquired by the plaintiff for depot purposes, under the provisions of the general railroad law as amended. (Laws of 1854, chap. 282, § 17.) The value of the land and of the interest of a

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lessee of the town in a portion thereof, were appraised at upwards of \$5,500 and paid, and the plaintiff acquired a title thereto, in fee, pursuant to the act referred to. The general principle that land once taken and appropriated to a public use, pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated to a different public use, is well established (Mills on Em. Dom., chap. 5, §§ 45, 46, etc., and cases cited), and does not appear to be controverted on the part of the defendants, but they seek to take this case out of the operation of the principle on two grounds: *First*, that the land in question was not necessary for the use of the plaintiff for railroad purposes; and *second*, that it has never been used by it for such purposes, and that the laying out of the highway in question, through said lands, will not interfere with the property occupied by the plaintiff for railroad purposes, or cause any damage to the business of the plaintiff or affect its franchises.

These facts were found by the trial court in favor of the defendants, but the plaintiff claims that such findings are contrary to the uncontroverted evidence in the case.

The land acquired by the plaintiff, and through which it is proposed to open the highway, consists of a tract containing several acres lying at the terminus of the plaintiff's railroad, on the seashore at Coney Island. The company have erected thereon a depot and waiting room, car houses, a restaurant, track yards and other appliances directly used in the actual operation of the road, and the space between the southerly end of the depot building and the beach, which consists of a strip about seven hundred feet in length, is occupied by railroad tracks running to high-water mark, plank walks by which passengers may walk from the depot to the beach, and by various structures for their accommodation, convenience and pleasure, viz.: benches, seats, places of refreshment, an observatory, newspaper stand, a music stand, and other objects intended to render the place attractive and capable of accommodating a large number of persons.

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These appliances are claimed by the plaintiff to be appropriate and necessary for the accommodation of its passengers, for the reason that its railroad is purely an excursion road for the conveyance of passengers to the sea beach for the purposes of bathing and recreation. That it is indispensable that they should have access from the cars to the beach, and that very extensive arrangements are necessary for their reception and accommodation, by reason of the vast numbers of passengers who flock there during the summer season. It being found as a fact that the plaintiffs run from one hundred and ten to one hundred and thirty passenger trains per day, and that the number of passengers conveyed to and from the depot grounds in question is from ten to twenty thousand per day each way.

The question whether all the land taken and now occupied by the plaintiff for these purposes was necessary for its business, was open to litigation in the proceedings for the condemnation of the land, and it was there expressly put in issue by the town of Gravesend, who opposed the condemnation. The court at Special Term necessarily passed upon the question in granting the application for the appointment of commissioners of appraisal, and its order was affirmed by the General Term and by this court.

We do not think it is now open to the officials of the town to question collaterally, in this action, the propriety of the condemnation, on the ground that the land taken was not necessary for railroad purposes, and to appropriate it without any special legislative authority to the purposes of a public highway. Nor do we think that there is any evidence in support of the finding that the opening of the proposed highway through the plaintiff's land will not interfere with the property occupied by the plaintiff for railroad purposes, or cause any damage to its business. No witnesses were called on the part of the defendants on that issue, and the case rests wholly on the testimony of the plaintiff's witnesses. From their testimony it appears that the proposed highway will cross that part of the depot grounds which lies between the southerly end of the depot building and the beach. That in the first

place it will deprive the plaintiff of a large part of the area required for the reception of its passengers, and in the second place that it will expose them to danger from passing hacks and other vehicles; that the ground in front of the depot building, now devoted to the use of the passengers, is insufficient for the purpose; that at times it is compacted with people and difficult to walk across it, or from one portion to the other; that a large portion of the passengers consist of women and children, and that it would be unsafe for them to pass over these grounds if they were put beyond the control of the railroad company, and a public road should be permitted to pass through them. These witnesses also concur in testifying that, for the accommodation of the plaintiff's passengers, all the land it has, and more too, is necessary, and that the construction of the road in question would be highly injurious to the railroad company and its business, and dangerous to its passengers. No witness was called by the defendants to contradict these statements of the plaintiff's witnesses, and the only manner in which it was attempted to controvert them was by showing on their cross-examination that some of the structures on the land were devoted to purposes of refreshment and amusement; that there were restaurants, a drug store, an observatory, a newspaper stand, a music stand, etc., on the premises. These, the witnesses stated, were proper adjuncts of the railroad, and necessary to make the place attractive. But assuming that they were not strictly necessary for railroad purposes, the testimony still stands that all the space which the plaintiff had was necessary for the accommodation of its passengers, and that taking away so large a part of that space as the defendants proposed to take, and appropriating it to the purposes of a public road, would be a serious injury to the business of the railroad. It is obvious that from the character of the road, being an excursion road, over which from ten to twenty thousand persons daily passed each way, trains arriving and departing every few minutes, more accommodation was necessary than a mere ordinary station house where passengers could be received into and discharged from the cars, and thence disperse,

and that they would naturally, if not necessarily, congregate on the depot grounds on the sea beach, and that places for their shelter, rest and convenience were not inappropriate. And the court having adjudicated in the condemnation proceedings, that all the land acquired by the plaintiff was necessary for depot purposes, that adjudication should not be impeached collaterally, especially by the officers of the town which was a party to those proceedings, and had raised therein the question of such necessity, and after being defeated on that issue, had received compensation for the full value of the fee.

The erection on the land of decorations and conveniences for passengers, some of which might possibly be deemed superfluous, was not an abandonment by the company of the uses for which it acquired the premises. These structures were intended to promote the comfort and convenience, and perhaps the pleasure, of the public who might patronize the railroad, and thus augment its business, and were not so foreign to the purposes for which the land was acquired, or so reprehensible as to produce a forfeiture of the rights of the company in the adjacent lands, or of the protection of the law in respect to them. But if the company has incurred any such forfeiture, it does not lie with the highway commissioners to enforce it.

Reference has also been made to the statutes relating to laying out highways, and among others to the provisions of 1 R. S. 514, §§ 58, 64, which prohibit laying out highways through improved lands without compensation. The lands in question are certainly improved lands, and the title of the plaintiff thereto is unquestionable. But we do not rest our decision upon that point, but upon the fact that these lands having already been lawfully appropriated, under the right of eminent domain, to a public purpose, express and direct legislative authority is necessary to justify their appropriation by proceedings *in invitum* to a different public purpose, and that general laws authorizing the laying out of highways are not sufficient. In respect to the crossing of railroad tracks by highways, such express authority is contained in the General Railroad Act, but this authority does not extend to lands taken for

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depot purposes. (*Alb. & N. R. R. Co. v. Brownell*, 24 N. Y. 345.)

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

SARAH L. TOLES, Respondent, v. GEORGE ADEE et al., Executors, etc., Appellants.

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Where the contract of a surety is not an absolute guaranty of payment of a debt of his principal, but simply an undertaking of such a nature that proceedings must be taken against the debtor before the obligation of the surety to pay arises, the law implies a condition on the part of the creditor that due diligence shall be used in proceeding against the principal; and to establish a defense based on a breach of this condition, it is not necessary for the surety to show a request on his part to the creditor to proceed, and damage resulting to him from a failure to comply.

In 1867, S., defendant's testator, for the purpose of procuring the discharge of A. from arrest, under an order of arrest issued in an action brought against him by plaintiff, executed an undertaking to the effect that A. would at all times hold himself amenable to process issued to enforce the judgment. In July, 1868, plaintiff obtained judgment. A. remained within the jurisdiction of the court until December, 1868, when he left the State, he returned in February, 1869, to his former home and remained about a month. S. died in 1870. A. returned again to the State in June, 1871, where he remained, openly visiting in plaintiff's neighborhood, for five or six weeks. Plaintiff did not enter judgment until April 21, 1874; execution was issued thereon against the property of A. on April 23, which was returned unsatisfied, and on May 4, 1874, an execution against the person was issued and returned not found. In an action upon the undertaking defendant gave evidence to the effect that in October, 1868, and in June, 1871, notice to proceed was given to plaintiff's attorneys. The court submitted to the jury the question as to whether plaintiff's delay in entering judgment and issuing process had injured or impaired the rights of the surety, charging in substance, that if no injury had resulted therefrom, plaintiff was entitled to recover. *Held* error; that the entry of judgment and issuing of process against the testator's principal were conditions precedent to the liability of the surety, that a neglect to perform such conditions with due diligence discharged the surety; and that the facts conclusively established *laches*.

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Also *held*, that, conceding it to have been necessary for the defense to prove injury to the surety by the delay, such impairment and injury were conclusively established, and the submission of the question to the jury was error.

The distinction between the case of a surety absolutely liable, and one whose liability depends upon the performance of conditions precedent pointed out.

Evidence was given on the part of the plaintiff that in August, 1868, S. requested plaintiff not to proceed further in the action. *Held*, that assuming this to have been established, the request could not be deemed to continue after the death of S., and even without any request upon the part of the defendants, his executors, if plaintiff desired to hold the estate responsible, it then became her duty to use due diligence, which she failed to do.

(Argued January 24, 1883; decided March 13, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought against defendants as executors, etc., of Stephen B. Adee, deceased, upon an undertaking executed by said testator.

The case is reported upon a former appeal in 84 N. Y. 222.

The undertaking recited in substance the arrest of Augustus W. Adee by virtue of an order of arrest issued in an action wherein the plaintiff here was plaintiff and said Augustus W. Adee was defendant, and by it the said Stephen B. Adee did "undertake, in the sum of \$2,000, that if the defendant is discharged from arrest, he shall at all times hold himself amenable to the processes of the court during the pendency of this action and to such as may be issued to enforce the judgment thereof."

The material facts are stated in the opinion.

George Adee for appellants. By title 7, chapter 1, Code of Procedure, no bail or security can be taken of a person while under arrest, except as prescribed by said act. (*Winter v. Kinney*, 1 N. Y. 365; 3 Blackst. Com. 277, 288; 2 R. S. 348, § 7; *Julian v. Rathbun*, 39 N. Y. 369; *Hardman v. Bowen*, id. 196, 198; *Briton v. Lorenz*, 45 id. 51; *Randall v. Sackett*,

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77 id. 480, 482; *U. S. v. Pierce*, 9 How. 83.) The undertaking is void under 2 R. S. 286, § 59, as taken by the sheriff *colore officii*. (*Toles v. Adee*, 84 N. Y. 222; *Cook v. Freudenthal*, 80 id. 205; *Winter v. Kinney*, 1 id. 365; *Shaw v. Tobias*, 3 id. 188; *Richardson v. Crandall*, 48 id. 348; *Sullivan v. Alexander*, 19 Johns. 233; *B'k of Buffalo v. Boughton*, 21 Wend. 57; *Barnard v. Viele*, id. 88; *People v. Meigham*, 1 Hill, 298; *Newton v. Pope*, 1 Cow. 109; *Lamer v. Meeker*, 25 N. Y. 261; *Rudd v. Davis*, 2 Hill, 287; affirmed, 7 id. 529; *Seibert v. Erie R. R. Co.*, 49 Barb. 583; *Satterthwaite v. Vreeland*, 3 Hun, 152, 155; *White v. Stillman*, 25 N. Y. 541; *Draper v. Stouvenel*, 38 id. 219; *Fellows v. Northrup*, 39 id. 117; *Mason v. Lord*, 40 id. 476; *Sheldon v. Sheldon*, 51 id. 354; *Fordham v. Smith*, 44 How. 472; *Robinson v. McManus*, 4 Lans. 380, 387; *Gordon v. People*, 33 N. Y. 501, 514; *People v. McWhorter*, 4 Barb. 438; *People v. Dyle*, 21 N. Y. 578; *Brooks v. Steen*, 6 Hun, 516.) If the verdict and judgment are not against law and the undisputed evidence, they are against the weight of evidence, and a new trial should be ordered. (*Conrad v. Williams*, 6 Hill, 444; *Townsend Manuf. Co. v. Foster*, 51 Barb. 346; *S. C.* affirmed, 41 N. Y. 620 n; *Jackson v. Sternbergh*, 1 Caines, 162; *Boyd v. Colt*, 20 How. 384; *Hartman v. Proudfit*, 6 Bosw. 191; *Eldridge v. Reed*, 2 Sweeney, 155.) Proof whether the sheriff understood at the time that he was acting and taking the bond "as sheriff," or as an agent, or intermediary, was proper, and it was proper to show his intentions at the very time. (*Thurston v. Cornell*, 38 N. Y. 281; *Cortland Co. v. Herkimer Co.*, 44 id. 22; *Seymour v. Wilson*, 14 id. 567; *More v. Deyoe*, 22 Hun, 223; *Rouse v. Whited*, 25 N. Y. 170.) A surety is discharged by the neglect of the creditor, upon request of the surety, to proceed against the principal, if thereby the debt has been lost. (*Remsen v. Beekman*, 25 N. Y. 552; *Colgrave v. Tollman*, 67 id. 95; *Root v. Wagner*, 30 id. 9, 17; 4 Mass. 60, 63; 6 N. H. m. p. 405.) If a plaintiff neglects to perform with due diligence the conditions precedent, which are necessary to be performed in order to render the

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surety liable, the surety is thereby discharged. (*Northern Ins. Co. v. Wright*, 76 N. Y. 445; *McMurray v. Noyes*, 72 id. 523; *Craig v. Parkis*, 40 id. 181; *Row v. Pulver*, 1 Cow. 246; *Penniman v. Hudson*, 14 Barb. 579; *Burt v. Horner*, 5 id. 501; *Van Derveer v. Wright*, 6 id. 547; *Newell v. Fowler*, 23 id. 628; *Moakley v. Riggs*, 19 Johns. 69; *Taylor v. Bullen*, 6 Cow. 624; *Thomas v. Woods*, 4 id. 173; *Cumpston v. McNair*, 1. Wend. 457; *Eddy v. Stantons*, 21 id. 255; *Loveland v. Shepard*, 2 Hill, 139; Code of Pro., § 288; *Feke v. Edgerton*, 3 Abb. 229; *S. C.*, 5 Duer, 681; Code of Civil Pro., § 572; *Sumner v. Osborn*, 11 N. Y. Weekly Dig. 25; *Randall v. Sackett*, 77 N. Y. 480, 482.) The omission to enter judgment and issue process was a fraud in law, implied or constructive. (1 Story's Eq. Jur., § 187; 2 Kent's Com. m. p. 483, note *d.*) Where a judge leaves it for a jury to infer a fact not warranted, it is error, and a new trial will be granted. (*Gale v. Wells*, 12 Barb. 84; *Harris v. Wilson*, 1 Wend. 511; *Story v. Brennan*, 15 N. Y. 524; *Millbank v. Dennistoun*, 21 id. 386.) A verdict against undisputed evidence should be set aside. (*Lamer v. Meeker*, 25 N. Y. 361; *White v. Stillman*, id. 541; *Seibert v. Erie R. R. Co.*, 49 Barb. 583.) The court will examine questions of fact as well as questions of law. (*Goodwin v. Conklin*, 85 N. Y. 21; Code, § 1337; *Tate v. McCormack*, 23 Hun, 218; *Halpin v. Third Ave. R. R. Co.*, 40 N. Y. S. C. 175; *Welke v. Haviland*, 42 How. 399, 410; *Parsons v. Brown*, 12 Hun, 112; *Finch v. Parker*, 49 N. Y. 8; *Macy v. Wheeler*, 30 id. 231; *Smith v. Ætna L. Ins. Co.*, 5 Lans. 545; *Townsend Manuf. Co. v. Foster*, 51 Barb. 346, 350-352; affirmed, 41 N. Y. 620; *Adsit v. Wilson*, 7 How. 64, 66; *Jackson v. Sternbergh*, 1 Caines, 162; *Conrad v. Williams*, 6 Hill, 444; *Boyd v. Colt*, 20 How. 382; *Thompson v. Henck*, 22 id. 431; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; Starkie on Evidence, part 3, p. 287; 1 Greenleaf on Evidence, §§ 51 a, 52; 1 Phillips on Evidence [3d ed.], 460; *Jackson v. Smith*, 7 Cow. 717; *Green v. Disbrow*, 56 N. Y. 334, 337.)

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I. H. Maynard for respondent. Although evidence is uncontradicted, yet if conflicting inferences may be drawn from it, or if conflicting constructions or meanings may fairly be given to the language employed, it becomes a question of fact and must be submitted to the jury. (*Smith v. Coe*, 55 N. Y. 678.) Where a witness is interested, his credibility is for the determination of the jury, although he may be uncontradicted. (*Kavanaugh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 id. 609.) If there was any irregularity or error in the mention of interest in the judgment, it should have been corrected by a direct motion or appeal in that action. (*Jewett v. Craine*, 35 Barb. 208.) The allowance of interest to the amount \$46.63 in excess of the penalty of the bond was right. (*Emmerson v. Booth*, 51 Barb. 41; *Brainard v. Jones*, 18 N. Y. 35.) It is always discretionary with the court as to the extent to which a cross-examination of the kind the sheriff was subjected to should be carried. (*Plato v. Riely*, 16 Abb. 188.) Interest is always a matter proper to be shown as affecting the credibility of a witness, and to be considered by the jury. (*Kavanaugh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 id. 609.)

RAPALLO, J. On the former appeal in this case (84 N. Y. 222) it was held by this court that the undertaking of the defendant's testator, upon which the action was brought, was not valid as a statutory undertaking of bail taken by the sheriff, and, if regarded as having been so taken, it could not be enforced; but that if not taken by the sheriff *colore officii*, but taken by the plaintiff's attorney, in pursuance of an agreement between him and the obligor, it constituted a contract between the parties, valid by the common law, and could be enforced as such.

That so treating it, the defendant's testator stood, not as bail, but as surety, by ordinary contract, that his principal would hold himself amenable to process. That as such surety he was not entitled to protect himself, as bail might, by the surrender of his principal, but that he had the rights of an ordinary

surety to require due diligence on the part of the plaintiff in pursuing his remedies against the principal; and inasmuch as *laches* in that respect had been charged, we held that the court below had erred in refusing to submit that defense to the jury — and on that ground we ordered a new trial.

On the new trial, which is now under review, it appeared that the undertaking in suit was given by the testator on the 23d of May, 1867, for the purpose of obtaining the discharge of the testator's son, Augustus W. Adee, from arrest under an order of arrest issued in an action instituted against him by the plaintiff, his wife, for a limited divorce. The undertaking was that said Augustus W. Adee should, at all times, hold himself amenable to the processes of the court during the pendency of the action against him, and to such as might be issued to enforce the judgment thereof.

In July, 1868, the action for divorce was tried and a decision rendered therein, which was filed on the 30th of July, 1868, and a copy served on the defendant's attorneys, whereby it was adjudged that the defendant pay certain sums for costs and alimony, and give security for future payments.

There was evidence that at some time during the month of August, 1868, the defendants' testator sent a verbal request to the plaintiff not to proceed further or make more costs, saying that he would see the matter settled up. But the defendant, George Adee, testified that in the month of September or October following, he served written notice upon the attorneys for the plaintiff, requiring them to proceed and tax their costs and enter their judgment.

The giving of this notice was denied on the part of the plaintiff, and was one of the issues on the trial of this action.

Augustus W. Adee, the defendant in the divorce suit, remained within the jurisdiction of the court until December, 1868, when he went to Chicago and was absent until February, 1869, when he returned to this State and remained about one month, then again left.

In February, 1870, the testator died, leaving a will whereby the defendants were appointed his executors, and they qualified as such in March, 1870.

Augustus W. Adee, in June, 1871, returned to this State, where he remained, openly visiting his acquaintances in plaintiff's neighborhood, for five or six weeks. On the day after his arrival the defendant, George Adee, as he testifies, went to the office of the attorneys for the plaintiff in the divorce suit and informed them of the presence of Augustus W. Adee, and that he would remain five or six weeks, and again notified them to tax the costs, and enter judgment and issue execution; and he, the respondent George W. Adee, being the attorney for Augustus W. Adee in the divorce suit, testifies that he further offered, for the purpose of saving time, to stipulate the amount of costs or accept service of notice of taxation.

This conversation was also denied and was one of the issues on the trial of this action.

The plaintiff entered no judgment and took no steps in the divorce suit until March, 1874, when new attorneys for the plaintiff therein were substituted, and on April 21, 1874, the substituted attorneys entered the judgment, and on the 23d of April, issued execution against the property of the defendant, which was returned, and on the 4th of May, 1874, they issued an execution against his person which was returned not found. Thereupon they presented a claim against the estate of the testator upon said undertaking, which being rejected they brought the present action.

The defendants now claim that error was committed on the trial in the rulings and charge of the judge on the subject of the express requests to the plaintiff's attorneys to proceed in the divorce case, and they also claim that the plaintiff was bound to proceed and issue process with due diligence, without any request, on the ground that the entry of judgment and issuing of such process against the testator's principal, were conditions precedent to the liability of the surety, and that a neglect to perform such conditions precedent with due diligence discharged the surety.

The judge instructed the jury, and the instruction was repeated several times in the course of the charge, that if the acts of the plaintiff in not entering up the judgment and en-

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forcing it by issuing process had resulted in injury or damage to the rights of the surety, the plaintiff could not recover; but that if the acts of the plaintiff and her counsel had not in any way injured or impaired the rights of the surety, the plaintiff was entitled to recover, provided the undertaking was not taken by the sheriff under color of his office, as statutory bail.

The judge also submitted to the jury the question of the notices claimed to have been given in the fall of 1868, and in June, 1871, requiring the plaintiff to enter up judgment and proceed thereon, and further charged them as follows: "I submit to you to say whether the plaintiff in this action, who was the plaintiff in the action for divorce, has by her acts in neglecting to enter this judgment until the lapse of these years, neglecting to issue the execution against the defendant when he was in the county of Delaware and might have been taken perhaps, whether or not she has been guilty of *laches* or neglect *which has injured the rights of the defendants' testator, Stephen B. Adee*, and if you find that this plaintiff by any neglect *has wrought an injury to the surety* upon this undertaking, then the plaintiff is not entitled to recover."

The court further charged in respect to the verbal request for delay alleged to have been sent by the surety to the plaintiff immediately after the trial, which was testified to by the plaintiff's father, Mr. Gregg, that such request was not a contract but a mere notice which the surety could put an end to, and that if after such request the surety gave notice to proceed, as claimed, and after that notice the plaintiff or her attorney was guilty of negligence in proceeding, *which resulted in injury to the surety*, then the plaintiff would not be entitled to recover; and the judge finally charged the jury that if they found that there had been no negligence which *had wrought injury to the surety*, they should bring in a verdict for the plaintiff.

That there had been negligence in delaying the entry of judgment for nearly six years, could not admit of question, but, as has been seen, the judge in his charge left it to the jury to say whether this negligence had impaired the rights of the surety, or worked injury to him, and made the defense turn

upon their finding in this respect. They were, under the charge, at liberty to find that the notices to proceed were given in October, 1868, and in June, 1871, as testified to by George Adee, but to find a verdict for the plaintiff notwithstanding, on the ground that the neglect or refusal of the plaintiff for upwards of five years, to regard these notices or requests and to enter judgment and issue process, had not, in the opinion of the jury, impaired the rights of the surety, or worked any injury to him.

Exceptions were duly taken to the charge in this respect, and we think it was erroneous in either aspect of the case. Assuming that it was necessary that it should be proved by the defense that the failure to enter judgment and place process in the hands of the sheriff, in pursuance of the request of the surety, or of the present defendants, impaired their rights, or worked injury to them, we are of opinion that such impairment and injury were fully made out by uncontroverted evidence, and that it was error to submit those questions to the jury. As the surety did not stand in the position of bail, he could not protect himself by a surrender of his principal, and his only means of protection were to require the plaintiff to proceed. The uncontroverted evidence shows that for three periods of several weeks each, after the time when the plaintiff was in a condition to enter judgment and issue process, the principal was openly within the jurisdiction of the court, at his former home, and there is no pretense that he could not have been arrested if process had been in the hands of the sheriff. It is impossible to say that the rights of the surety or of the defendants were not impaired, and that they sustained no injury by the neglect of the plaintiff to issue this process, and even his refusal to do so after request, and by the charge the jury were at liberty to go to that extent.

The loss of the opportunity to procure the arrest of the principal, which would have been afforded to the sureties had process been in the hands of the sheriff, was of itself an injury and an impairment of their rights. If it be contended that the sheriff might have refused to return the execution against

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his property until the lapse of sixty days, and that by that time he could have departed, it is an answer to that suggestion that it was the fault of the plaintiff that she had not previously had an execution against the property returned, so as to be in a position to issue process against the person. But aside from this consideration it must be observed that the sheriff could have returned the execution against property immediately. In this very case the execution against property was issued April 23, 1874, and was returned and execution against the person issued on the 4th of May, 1874. But the jury would not have been permitted to speculate upon such a remote contingency as that the sheriff would throw obstacles in the way of the issuing of an execution against the person, without any probability of realizing any thing on the execution against property, and at all events the sureties were entitled to the opportunity of procuring the return of the execution against property in due time, and the loss of this opportunity, through the refusal of the plaintiff to proceed, was an injury, and an impairment of their rights. If a surety can be held under such circumstances as those here shown, there is no escape for one who enters into a contract like the one before us, for the only way in which he can prove damage is by showing that the principal was openly within the jurisdiction of the court, and therefore presumably might have been arrested by due diligence on the part of the creditor.

But we think that in a case of this description the law presumes injury and it is not incumbent upon the surety to establish it as matter of fact. The undertaking of the surety was not for the payment of the judgment, but merely that the principal should be amenable to the process of the court. This undertaking was not absolute, but conditional, viz.: that if the plaintiff should issue process, the defendant would be amenable to it, and it was a condition precedent to the accruing of any liability on the part of the surety that process should be issued against the principal.

The point now raised by the counsel for the appellants, that neglect to perform with due diligence the conditions precedent

which are necessary to be performed in order to render a surety liable, discharges such surety, is well sustained by authority and is in our judgment fatal to the recovery in this case. (*Craig v. Parkis*, 40 N. Y. 181, 188; *McMurray v. Noyes*, 72 id. 523; 28 Am. Rep. 180; *Northern Ins. Co. v. Wright*, 76 N. Y. 445.) This point was clearly raised on the second trial, but the distinction between the case of a surety who is absolutely liable and one whose liability depends upon the performance of conditions precedent, seems to have been disregarded and the case disposed of on the principles applicable to the first-mentioned kind of suretyship. The cases above cited point out this distinction. Throwing out of view all the evidence as to communications between the parties subsequent to the decision of the divorce suit, the alleged message of the surety to the plaintiff not to proceed and the alleged subsequent notices requiring her to proceed, this would be a plain case for the application of the rule above cited. Due diligence would have required the entry of judgment and issue of execution immediately or with due diligence after the decision in July, 1868, and it cannot be questioned that after that time there were abundant opportunities to arrest the defendant, and that the delay of nearly six years in entering judgment and issuing execution was any thing but due diligence.

Assuming, on the other hand, that the delay was requested, as alleged, in August, 1868, that request, as remarked by the court at the trial, was not a contract but a mere notice which could be terminated, and it could hardly be deemed to continue after the death of the testator, when new rights intervened, and his liability fell on the shoulders of his executors. Even without any express request on their part, if the plaintiff desired to hold the estate responsible, it then became the duty of the plaintiff to use due diligence to place herself in condition, by entering judgment and issuing execution against Augustus W. Adee, to issue execution against his person, and if she had done so, she could have arrested him when he returned to his former home in 1871. If the request testified to by George W. Adee in 1871 was made, the neglect of her attorneys to

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proceed on that occasion was a still more gross violation of the rights of the defendants as sureties. The plaintiff had no right to elect between her remedies against the principal, and her recourse against the estate, and to lie by and refrain from proceeding with due diligence to arrest the principal, for the purpose of ultimately holding the sureties for the debt. It was error so to charge the jury as to make the effect of his *laches* in discharging the sureties depend upon what the jury might find as matter of fact, on the question whether the sureties were injured or their rights impaired.

We do not, however, think that this request to the plaintiff to proceed was essential to the defense of *laches* in this case, but that if the request for delay, alleged to have been made in 1868, was not in fact made, or if made, it was revoked or terminated, it was the duty of the plaintiff to proceed with due diligence to perform the conditions precedent upon which the liability of the estate depended, and that *laches* in this respect operated as matter of law to discharge the estate. Whether such *laches* would have been excused by proof on the part of the plaintiff that Augustus W. Adee was at no time within the jurisdiction after the decision against him, and that no injury could possibly have resulted to the defendants from the delay in issuing execution, it is not necessary now to decide. It is sufficient for the purposes of this case that injury may have resulted and that due diligence on the part of the plaintiff might and probably would have saved the sureties from liability; and here lies the difference between an absolute guaranty by a surety of payment of a debt, and an undertaking of such a nature that proceedings must be taken against the debtor, before the obligation of the surety to pay arises. In the first class of cases no duty rests upon the creditor in the first instance to take any steps against the debtor, and a request to proceed, and damage resulting to the surety from refusal or neglect to comply with the request, must be shown by the surety, to establish a defense. In the last-mentioned class, such proof is not necessary, but the law implies a condition of

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the contract of suretyship that due diligence shall be used in proceeding against the principal.

The judgment should be reversed and new trial ordered, costs to abide event.

All concur.

Judgment reversed.

THE PEOPLE, ex rel. THE WESTCHESTER FIRE INSURANCE COMPANY, Appellant, v. GIDEON W. DAVENPORT et al., Trustees, etc., Respondents.

A party assailing an assessment as excessive must make it appear conclusively that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed.

The affidavit of a person taxed, as to the amount and value of taxable property possessed by him, presented to the assessors as the basis of a claim to be relieved from taxation, is not conclusive upon the assessors.

The act of 1880 (Chap. 110, Laws of 1880) regulating the examinations and reports of fire insurance companies does not affect the status, as taxable property, of premiums upon unexpired policies held by such a company.

The liability of the company to refund a part of such premiums to the assured upon surrender of the policies does not constitute a debt owing by it, and in assessing the value of its taxable property it cannot claim a deduction of the whole amount of unearned premiums (EARL, J., dissenting).

The relator was assessed \$76,000 upon personal property; it appeared before the assessors and asked to have the same stricken from the assessment. In the affidavit upon which the application was based it was conceded that the company had \$339,600 of personal property subject to taxation unless exempt by reason of its contingent liability for unearned premiums, this was stated to be about \$340,000. No statement was made as to the amount of the outstanding policies, the cost of reinsuring the risks, or the method by which the amount of liability stated was reached. The assessors refused to strike out the assessment. Their return to a writ of *certiorari* did not state the evidence upon which they proceeded, but alleged that the assessment "was duly and legally made." *Held* (EARL, J., dissenting), there was no evidence showing that the assessors did not deduct from the conceded assets all the relator was entitled to have deducted on account of said contingent liabilities, and in the absence of such evidence it was to be assumed that they proceeded legally.

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The provision of the act "to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations" (§ 8, chap. 542, Laws of 1880), exempting from assessment and taxation, save as provided for in the act, the capital stock and personal property of the corporations, companies and associations specified, applies only to State taxation; it does not affect the right of municipal authorities to assess and tax such property for local purposes.

In construing a statute its title is a legitimate subject of consideration in determining the legislative intent.

When the language of a statute, if applied in its literal sense, will lead to an absurdity or manifest injustice, it is the duty of the court to limit and restrict its operation.

Exemption from taxation is not favored by the courts, and unless the language of a statute is so clear and unambiguous that the intention of the legislature to create the exemption indisputably appears, such a construction will not be given to it.

The authorities upon this subject collated.

While, when in an amendatory statute there appears a radical change in the phraseology, it is generally to be regarded as a legislative construction that the law so amended did not, as originally framed, embrace the amended provisions; the time and the circumstances under which the amendment was enacted are to be regarded in considering its effect. If the amendment follows soon after the original act and after controversies have arisen as to its construction because of the use of doubtful phraseology therein, the amendatory act may be construed as in effect declaratory of the object and intent of the prior legislation.

Accordingly *held*, that the act of 1881 (Chap. 861, Laws of 1881), amending said provision of the act of 1880, by expressly restricting the exemption to taxes for State purposes, and the act (§ 3, chap. 542, Laws of 1880), legalizing and confirming the assessment and levy of taxes in the city of New York upon the corporations, etc., named, were to be considered as simply declaratory of the intent of the original act.

A declaratory act, although it has no conclusive force in the construction of the prior statute, yet is entitled to consideration and weight.

(Argued January 30, 1883; decided March 13, 1883.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 13, 1881, which affirmed an assessment made by the defendants, as the board of trustees of the village of New Rochelle, against the relator, upon personal property, and quashed the writ of *certiorari* by which said assessment was brought up for review.

The material facts are stated in the opinion.

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Samuel Hand, John H. Strahan and Martin J. Keogh for appellant. Upon the only evidence presented to the assessors, the relator was not assessable for any personal property, and it was their duty to reduce or strike out the whole assessment. (Laws of 1864, chap. 249, title 4, § 2; 1 R. S. 391, § 9, subd. 4.) The "actual value" of the assets of the relator (after deducting the exempt United States bonds) could only be estimated for the purpose of taxation, after deducting the unearned premiums. (2 Session Laws, 1857, p. 1; *People, ex rel. Ins. Co., v. Ferguson*, 38 N. Y. 91; *People v. Commrs.*, 76 id. 68, 73; *Oswego Co. v. Dalloway*, 21 id. 458; *State v. People's Ins. Co.*, 35 N. J. L. 575; *People, ex rel. Glens Falls Ins. Co., v. Ferguson*, 38 N. Y. 91.) Under the act of 1880, the relator was not liable to assessment on its personal property by the defendants, but the taxation there provided exempted it from taxation by localities. (Laws of 1880, chap. 542, §§ 3, 5, 8.) While it may be admitted that orders of the General Term, merely quashing the writ of *certiorari* without deciding the merits, are not appealable, yet where the order affirms the assessment, as in this case, an appeal will always lie. (*People v. Tax Commrs.*, 85 N. Y. 655; *S. C.*, 73 id. 607; *People v. Commrs.*, 76 id. 68, 73.)

George W. Parsons for N. Y. Board of Fire Underwriters, appellant. The facts shown by the respondents' return to the writ of *certiorari* in this case did not justify the imposition of the tax complained of. (38 N. Y. 91; *People v. Dolan*, 36 id. 62; 2 Laws of 1857, p. 1; 1 R. S. 415, original paging, part 1, chap. 13, title 4, §§ 1, 6; Laws of 1853, chap. 654, p. 1240, § 1; Laws of 1857, chap. 456, p. 1, § 3; Laws of 1863, chap. 240, p. 435, § 1.) Premiums unearned, reclaimable by policy-holders on demand for unexpired terms of their policies, are not liable to taxation. (76 N. Y. 64, 74; *People v. Ferguson*, 38 id. 89; *Matter of Croton Ins. Co.*, 3 Barb. Ch. 643; 2 R. S. 470, § 75; *Leroy v. Globe Ins. Co.*, 2 Edw. Ch. 673.) It is competent for the legislature to declare, as to corporations, what portion of their funds shall constitute "surplus

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profits" or "earnings," as distinguished from "capital." (*Mut. Ins. Co. v. Supv'rs*, 4 N. Y. 442; *Sun Mut. Ins. Co. v. Mayor, etc.*, 8 id. 241; *People, etc., v. Supv'rs*, 16 id. 424.) It is *res judicata* that these contingent liabilities of insurance companies must be taken into account by the assessing officers, and made the basis of proper reduction. (*Oswego Starch Co. v. Dillowry*, 21 N. Y. 458; *People v. Reddy*, 43 Barb. 439; *People, ex rel., etc. v. Comm'rs, etc.*, 76 N. Y. 73; *People v. Ferguson*, 38 id. 89.) The relator was right in seeking relief by *certiorari*, and this court has full power to review the action of the assessors, and to grant the relief sought. (Laws of 1856, chap. 302, § 20; *People v. Ferguson*, 38 N. Y. 89; *Western R. R. Co. v. Nolan*, 48 id. 513; *Genesee Valley N. B'k v. Supv'rs*, 53 Barb. 223; *People v. Allen*, 52 N. Y. 538; *People v. Kelly*, 35 Barb. 444; *People v. Supv'rs*, 51 N. Y. 442; *People v. Comm'rs*, 73 id. 607; *S. C.*, 85 id. 655; *People v. Comm'rs*, 76 id. 73.)

B. D. Silliman, Julien T. Davies, Edward Lyman Short for corporations similarly situated with appellant. Had the intention been a partial exemption only, it would have been so expressed. (*State v. Mayor*, 32 La. Ann. 713; *Bentley v. Rotterdam*, L. R., 4 Ch. D. 592; *Pillows v. Robert*, 13 How. [U. S.] 476; *Camber v. Hardecastle*, 3 B. & P. 117.) There is no ambiguity in section 8, and hence the language must be taken in its natural and obvious meaning. (*Park Bank v. Wood*, 24 N. Y. 98; *Hoyt v. Commissioners*, 23 id. 224; *Waller v. Harris*, 20 Wend. 562; *McCluskey v. Cromwell*, 11 N. Y. 601; *People v. R. R. Co.*, 13 id. 78; *U. S. v. Fisher*, 2 Cranch, 399; *Warburton v. Loveland*, 2 D. & C. 489; *Cheewee Tobacco*, 11 Wall. 620; *Mead v. U. S.*, 9 id. 720.) In the construction of similar statutes total exemption has been conceded. (*Ill. Cent. R. R. Co. v. McLean*, 17 Ill. 291; *State B'k v. People*, 5 id. 303; *B'k Cape Fear v. Edwards*, 5 Ired. 576; *State v. Berry*, 17 N. J. 80.) In the construction of similar statutes the unambiguous character of the language has been held controlling. (*Newstandt v. R. R. Co.*, 31 Ill. 484; *Bd. of Supervisors v.*

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Campbell, 42 id. 490; *Farmers' B'k v. Comm.*, 6 Bush, 127; *E. & P. R. R. Co. v. Trustees*, 12 id. 236; *Johnson v. Commonwealth*, 7 Dana, 342.) The rule that exemptions are to be construed strictly has no application, the statute presenting the case of a substitution of a new tax for an old one, and not an exemption from taxation. (*M. & St. P. Ry. Co. v. Bd. Supervisors*, 29 Wis. 116; Holland's Elements, 289; Vattel, B. 2, chap. 17, § 305; Story, 411; Hardcastle, 8; 2 Phil. Int. Law, 106; *State Lottery Co. v. City of New Orleans*, 24 La. Ann. 86; *C. & A. R. R. Co. v. Hillegar*, 18 N. J. 11, 71; *Gardner v. State*, 21 id. 557; *State v. Winton*, 23 id. 529; *N. Y. & E. R. R. Co. v. Sabin*, 26 Penn. St. 242.) The court cannot determine what would be the wisest policy and construe the statute accordingly. (17 Ill. 991.) The statute gives a commutation for all other taxes. (*State B'k v. People*, 5 Ill. 304; *Hunsaker v. Wright*, 30 id. 146; *Daughdrill v. Ala. Co.*, 31 Ala. 91, 99.) The Virginia cases cited in opposition must be read in connection with *City of Richmond v. D. R. R. Co.* (21 Gr. 694). Laws of 1881, chapter 361, section 8, does not contain a legislative construction of section 8, or reveal any intention that the exemption was partial. (*People v. Bd. Supervisors*, 16 N. Y. 431; *People v. Wilson*, 3 Hun, 441; *Ropes v. Clinch*, 8 Black, 303.) If restrictive interpretation be given, then under existing statutes, the capital stock and personal property must be taxed for all purposes, State as well as local, in New York city. But the tax would be void *in toto*, because void as to State purposes. (*Johnson v. Colburn*, 36 Vt. 695; *Clarke v. Strickland*, 2 Curtis, 443; *Bangs v. Snow*, 1 Mass. 181; *Nelson v. Kempton*, 13 id. 282; *Freeland v. Hastings*, 92 id. 370; *Drew v. Davis*, 10 Vt. 508; *Huse v. Merriam*, 2 Me. 345; *Hubbard v. Brainard*, 35 Conn. 563; *Campbell v. State*, 41 Ill. 455; *Malvern v. Redshaw*, 1 Mod. 35.)

Odle Closs and George P. Andrews for respondents. The respondents were not bound to adopt the statement of the relator, but after obtaining all information within their reach,

it was their duty to assess the relator in such sum as they determined to be just, and such determination on their part is final. (*People, ex rel. M. F. Ins. Co., v. Commrs.*, 76 N. Y. 64, 69, 70, 71, 72.) The relator was not entitled to exemption, under chapter 542 of the Laws of 1880, from assessment and taxation for local purposes. (3 N. Y. Monthly Law Bulletin, No. 1; *C. & A. R. R. Co. v. City Council of Alexandria*, 17 Gratt. 176; *Humphreys v. City of Norfolk*, 25 id. 97; *West. U. Tel. Co. v. City of Richmond*, 26 id. 1; *Buffalo City Cemetery v. Buffalo*, 46 id. 506; Cooley on Taxation, 146-151.)

RUGER, Ch. J. This appeal presents two questions, viz.:

First, whether the relator had in the month of January, 1881, personal property liable to assessment and taxation.

Second, whether section 8 of chapter 542 of the Laws of 1880 exempted it from assessment upon its personal property for purposes of local as distinguished from State taxation.

The record shows that the board of trustees of the village of New Rochelle, Westchester county, assessed the relator in January, 1881, upon a valuation of \$76,000, for personal property, for the purposes of raising a fund to pay for the expenses of lighting and keeping in repair the street lamps, repairing roads and bridges, and for the contingent expenses of the village.

The relator objected to any assessment upon personal property and presented to the board of village trustees, who were duly authorized to make such assessment, an affidavit made by their secretary about the 8th day of January, 1881, as a basis for such objection. There also appears in the record a subsequent affidavit made by said secretary as the foundation of these proceedings to review such assessment. From both of these affidavits it appears that the relators were the owners of personal property at the time of the assessment in question, to the amount of \$774,600; that of this amount \$500,000 consisted of an investment in the bonds of the United States government not subject to taxation. That their liabilities for unpaid losses amounted to about \$35,000 — leaving \$239,600 of

personal property subject to taxation, unless they were exempt therefrom by reason of a contingent liability stated in the affidavits as follows, *viz.*: "Premiums unearned reclaimable by policy-holders on demand for unexpired terms of their policies (about) \$340,000."

If this exemption is allowed to the extent claimed it follows that the relators have no personal property subject to taxation. The return of the trustees to the writ of *certiorari* herein does not state the evidence upon which they proceeded in making the assessment against the relator, but does allege that the said assessment was "duly and legally made." As the law stood prior to the passage of the act of 1880, the surplus earnings and capital stock of an insurance company were liable to assessment at their actual value less certain deductions provided for by statute, and such value was to be determined by the assessors upon such evidence as was accessible to them. (Chap. 456, Laws of 1857; *People, ex rel. Glens Falls Ins. Co., v. Ferguson*, 38 N. Y. 91.) The affidavit of the person taxed as to the amount and value of taxable property possessed by him may be presented to the assessors and made the basis of a claim to be relieved from assessment, but such affidavit is not conclusive upon the assessors, and they are authorized to inquire further and estimate the actual value of such taxable property upon such evidence as they may possess. (*The People, ex rel. M. F. Ins. Co., v. Commissioners*, 76 N. Y. 73.) We have no evidence before us which shows that the assessors did not deduct from the conceded assets of the relator all that it was entitled to have deducted on account of its contingent liabilities.

We have shown that at least \$163,600 was thus deducted by the trustees, and there is no evidence in the case upon which a legal conclusion can be predicated that this deduction was not all that the relator was entitled to ask.

The affidavit of the secretary of the company does not state the amount of outstanding policies carried by the company, the cost of reinsuring their risks, or the method by which he computes the amount that holders are entitled to reclaim upon

a surrender of the unexpired policies. The affiant, assuming the power of judgment upon the various questions involved in arriving at such a result, swears that a certain amount is liable to be reclaimed by policy-holders. This is a mere legal conclusion, which has been predicated upon facts not disclosed.

It is essential that a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed. This does not appear in this case unless we assume that the method adopted by the secretary in computing the amount which policy-holders were entitled to reclaim from the company was correct, and also that the value of the property of an insurance company is impaired to the full amount which it is thus liable to refund.

We can find no authority either in the statute or the reported decisions of the courts to sustain such a conclusion. It was held by this court in the case of *The People, ex rel. The M. F. Ins. Co., v. The Commissioners of Taxes* (*supra*), that none of the provisions of the various statutes included in chapter 466, Laws of 1853, chapter 563, Laws of 1854, and chapter 199, Laws of 1865, affected the status as taxable property of premiums upon unexpired policies held by a fire insurance company. Chapter 110 of the Laws of 1880 falls within the reason of the same case and does not, therefore, affect the taxable status of such property. We are not aware of any statute which, either directly or by implication, establishes a rate for taxing any of the property belonging to a fire insurance company at less than its fair value, and what that value may be is to be determined by the assessors, by the same rules that govern them in arriving at the value of the property of an individual. It was held by this court in the case of *The People, ex rel. Glens Falls Ins. Co., v. Ferguson* (38 N. Y. 89) that when the assessors absolutely refused to deduct any sum from the assessment for personal property of an insurance company on account of its contingent liability to refund unearned premiums, that they erred, and that such liability should be taken into account in arriving at the actual value of its assessable property.

This court, in the case of *The M. F. Ins. Co. v. Commissioners (supra)*, decided that an insurance company had no cause to complain that an assessment was excessive when the assessors had appraised its receipts for premiums upon unexpired policies at fifty per centum of such receipts. The court, in that case, intimated quite strongly that a claim to have the entire amount of cash receipts deducted could not be supported under our statute, and quoted approvingly the case of *The People's Fire Ins. Co. v. Parker* (35 N. J. L. 575), where it was held that such premiums were the property of the company and liable to taxation, without deduction for contingent liability on outstanding policies. To say that such receipts constitute a trust fund held by an insurance company for the use of the policy-holders, or that it is a liability of the company in any such sense as to constitute a debt entitled to be deducted from the sum of its property in determining the value thereof for assessable purposes, is contrary to reason, and is not sustained by any authority known to us.

The insurer in fact not only acquired the absolute ownership to such moneys when received for premiums, but is, by the lapse of time, soon freed from liability to repay any part thereof to the policy-holders, except in those occasional instances where a loss occurs.

The receipts of a mutual life insurance company authorized to be accumulated and kept as a fund for the payment of losses during its existence, but subject eventually to be divided among its policy-holders, were held to be capital subject to taxation. (*The People, ex rel. Mut. L. Ins. Co., v. Supervisors*, 16 N. Y. 425.) The liability of an insurance company to refund any part of the premiums received by it is remote and contingent and does not constitute one of the objects contemplated by either party in entering into a contract of insurance. The immediate object contemplated by the insured is to obtain an indemnity for any prospective loss which he may be subjected to on account of the peril insured against.

The object of the insurer is to obtain such a sum as will afford him a profit over and above an indemnity on account of

the contingent liabilities which he may incur in the aggregate on account of the various contracts entered into by him.

The right of the assured to surrender his policy and claim a return of the balance of the premium paid by him, less the short rates charged for the time the policy has actually run, is a mere incidental right not contemplated by the parties when the contract was made and is practically seldom resorted to by the policy-holder, for the reason that it is inconsistent with the object and intent of his original contract.

Neither in law or equity does this liability constitute a debt owing by an insurance company which should be deducted from the value of its taxable property, when it is called upon to bear its proportion of the burdens of government.

The conclusion to which we have arrived on this branch of the case is the more gratifying for the reason that otherwise a vast amount of property held by insurance companies in the shape of so-called unearned premiums would altogether escape taxation. Such a result would produce manifest injustice. It would be improper for us to point out the manner by and the amount for which this fund should be subjected to taxation, for the reason that we have not the data and facts before us upon which to base a conclusion, and that question must be left undetermined until a proper occasion arises for its consideration.

There would seem to be some plausibility in a claim that the amount of its assessable property should be reduced by the price which it might cost to obtain a reinsurance of its outstanding risks, were it not for the fact that thereby the charges made against such receipts would be swelled by the increased cost of short rates and the expenses and anticipated profits of two companies instead of one. But in this case we have no way of arriving at the amount which would be required to effect a reinsurance upon the outstanding risks of the relator, and we have no way of determining whether more or less than fifty per centum of the receipts for premiums upon unexpired policies was deducted, either in the computation made by the secretary of the relator, or in the estimates of the

trustees. Until the contrary be shown, we must assume that the trustees proceeded legally in the performance of their official duty.

We are, therefore, brought to the consideration of the second question raised by this appeal, viz.: as to the effect of the provisions of chapter 542, Laws of 1880, upon the power of local authorities to assess the companies therein named upon their personal property, for the purpose of taxation. This act, among other things, provides for the payment by such companies of a tax to be estimated in the manner therein particularly pointed out. Then follows the particular clause, under which it is claimed that such corporations are exempted from the payment of all taxes, except those therein specified, and which reads: "The lands and real estate of the various corporations, joint-stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall, hereafter, be exempt from assessment or taxation, except as in this act prescribed, and no tax on gross receipts, except as in this statute authorized, shall be imposed or charged against any street horse-railroad company." It cannot be disputed but that the language employed in the exemption clause of this section, if considered literally, is broad enough to sustain the claim of the relator, but it is claimed on the other hand that it must be construed in connection with the other portions of the same section and act, in view of the existing circumstances and facts to which it relates, as well as of other statutes in *pari materia*, and that if, from these sources, an intent, on the part of the legislature, to restrict the operations of the general words of the statute can legitimately be inferred, it is the duty of the court to give effect to such intent. Some question is raised as to the extent to which the court can inquire into the intent of the legislature with the view of restricting the effect of general language, which, in itself, is plain and unambiguous, but the right of doing so, to some extent, is conceded by the most conservative. (*Smith v. People*, 47 N. Y. 330; *The People, ex*

rel. *Wood*, v. *Draper*, 15 id. 532; *White* v. *Wager*, 32 Barb. 250; affirmed, 25 N. Y. 328; *Rogers* v. *Bradshaw*, 20 Johns. 735.)

This is a power which should be carefully exercised, and assumed only when the meaning and intent of the legislature can be clearly ascertained and a contrary interpretation would be productive of injustice or great public injury. (*People* v. *Lambier*, 5 Denio, 9.)

It was formerly held that the title of an act was no part of the act itself, and was of little legislative import, but by the Constitution of this State it is made, in some cases, of controlling importance, and it is here held to be a legitimate subject for consideration in determining the intent of special legislative action. (*People* v. *Molyneux*, 40 N. Y. 113; *Bishop* v. *Barton*, 2 Hun, 436; affirmed, 64 N. Y. 637.) But a principle of construction of universal authority is that which requires the court to limit and restrict the operation of a statute when its language, if applied in its literal sense, would lead to an absurdity, or manifest injustice. (Rules of interpretation by various authors; Potter's *Dwarris on Statutes*, pages 121 to 146.)

JOHNSON, J., who favored a strict construction of the Constitution in *Newell* v. *The People* (7 N. Y. 97) says: "If the words embody a definite meaning, which involves *no absurdity and no contradiction between different parts of the same writing*, then that meaning, apparent upon the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed."

It necessarily follows that when a statute does lead to an absurdity or to contradiction between its different parts its general language may be interpreted to conform to the presumed intention of its framer. These principles of construction are more frequently called into exercise in construing acts of the legislature creating exemptions from taxation than any other, for the reason that exemptions to individuals from the common burdens laid upon citizens by the necessities of government are not favored by the courts, and are generally strictly con-

strued. The courts have, therefore, required an exemption from taxation to be described in clear and unambiguous language, and to appear to be, undisputably, within the intention of the legislature, or they have declined to enforce it. "The taxing power is of vital importance," said Chief Justice MARSHALL in *Providence B'k v. Billings* (4 Pet. 561); "its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." Illustrations of these rules are quite common in the books, and the following cases are among them: When an act exempted churches or places of public worship from "being taxed by any law of the State," it was held that they were liable to an assessment for improving a street. (*In the Matter of the Mayor, etc., of New York*, 11 Johns. 77.) An act exempted cemetery associations from "all public taxes and assessments." Held, that they were liable to tax for building a sidewalk. (*Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506.) An exemption "of every school-house, and every building erected for" a "seminary of learning," was held not to exempt a private boarding school. (*Chegaray v. The Mayor, etc., of New York*, 13 N. Y. 220.) Exemption from "taxation of every kind" does not exempt from an assessment for street improvements. (*Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412.) A railroad company paid the State a specific tax under a law which provided that it should not "be assessed with any tax on its lands, buildings or equipments." Held not to preclude municipal taxation. (*Orange and Alexandria R. R. Co. v. Alexandria*, 17 Gratt. 176.) A statute laid a tax on railroads and declared it to be "in lieu of all other taxes." Held not to exempt them from taxation for laying out a highway. (*Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63.) The Foster Home Society, by its charter, was exempt from "taxes and assessments." Held, that this did not include local assessments for municipal purposes. (*State Protestant Foster Home Society v. The Mayor, etc.*, 35 N. J. Law, 157.)

Where an act exempted a society from "all taxes, charges and impositions," it was held not to include a tax for improv-

ing streets. (*The City of Paterson v. The Society of E. U. M.*, 4 Zahr. 385.) A statute providing that houses for schools, etc., should be exempt from taxation, held not to relieve them from taxation for streets. (*In the Matter of College Street*, 8 R. I. 476.) Where a cemetery company was exempted from the payment "of any tax or public imposition whatever," it was held that a paving tax was not embraced in the exemption. (*Mayor of Baltimore v. Green Mount Cemetery*, 7 Md. 517.)

Some of these cases were decided upon the ground that assessments for the opening of a street and similar purposes were not taxes but were for benefits; however, they seem to illustrate the general principle that the courts are not, in all cases, bound to give effect to the broad and unrestricted language of a statute.

In the light of these principles let us approach the examination of the act in question.

From a general comparison of its provisions with the tax laws in force at the time of its enactment, and the statistics relating to taxation, we find that in any event it provides for a large reduction in the rate of taxation collectible from some, if not all, of the companies described therein. If it be held to exempt them from liability to pay State taxes alone, the reduction from the existing rates would, in many instances, be considerable; but if it should also be held that the act of 1880 exempted them from the payment of all taxes except the tax therein imposed, their contributions to the support of government would be still more largely reduced, a consequence which would seem to show that either they had been overburdened heretofore, or that the legislature did not contemplate so large a deduction from their taxation as the contention of the appellants would now seem to authorize. The corporations named in this act are universally organized and owned by individuals, for their individual profit and advantage, and there is nothing in the character of their business or the objects of their organization which especially entitles them to exemption from the burdens which are common to all other enterprises and citizens,

and it is our duty to scan closely any law under which they claim special immunities or privileges. A logical deduction from the claim of the relator would not only deprive the local legislature of cities and counties of the power of distributing local burdens so that the property of the corporations benefited should bear its equal share, but would operate as a repeal, by implication, of all existing laws authorizing the imposition upon them of taxes for local purposes. No claim is made that there is any attempt to accomplish this repeal, by direct language, but it is urged that an intention to do so must be inferred from the repugnancy claimed to exist between the language of the act and the power of taxation conferred by prior statutes. It is an established principle that the repeal of a statute by implication is not favored, and it is only when the two statutes cannot be so construed as to stand together and to give to each some legitimate effect and operation that a repeal is held to be intended. A consideration of the number and object of the statutes authorizing local taxation throughout the State presents this argument of the relator in a startling aspect. Those objects include the raising of funds for the support of local government, educational purposes and the poor, the establishment and maintenance of police and fire department, the opening, paving, repaving and improving of streets, highways and sidewalks, the lighting of the same, the enforcement of sanitary regulations, the acquisition of cemeteries, free libraries and lands for monument purposes, and the payment of municipal bonded indebtedness. These comprise but a few of the objects for which such taxes may be imposed.

Most of these objects inure directly to the benefit of these corporations, and some of them are indispensable to their safety and protection. In addition to the general laws imposing the duty of protecting all citizens and property-owners upon the local authorities in our State, such corporations, like other citizens, are specially entitled by statute to recover damages from the cities and counties wherein the loss occurs for such injuries to their property as may be occasioned by mobs, riots and unlawful assemblies. It is within the knowledge of

all that, under these statutes, municipal corporations have been held responsible, in heavy damages, for losses of such a character incurred by corporations, and quite recently, in our own State, counties and cities were sought to be charged with the duty of preserving corporate property which had been seized by mobs to the amount of many millions of dollars. Many of the corporations claiming the benefit of this exemption are purely local in their organization and business, and claim their entire support from the communities where they are located.

Taxation and protection are correlative obligations, and it is contrary to justice and fundamental principles to impose the one and withdraw the other. It is undoubtedly competent for the legislature in the exercise of its legitimate power to do an act which is so unequal and unjust as this, but it is also in accordance with established principles that it should be required to manifest such intention in plain and explicit language concerning which there can be no misunderstanding.

Taxation for local purposes is usually based upon the annual assessment-rolls of the towns or cities, and if it is made unlawful to include the property of these corporations in such rolls, their exemption from local taxation becomes absolute.

If we turn from the consideration of the policy of the act and its necessary consequences to the language used therein, we shall find strong reason to infer that the legislature intended to exempt the corporations named therein from State taxation alone.

The sentence by which the lands, buildings and real estate of said corporations are reserved for taxation in the locality where situated, affords some evidence of an intention to exclude their other property from local taxation, but the strength of the argument is much impaired by the apparent confusion which runs through the whole section.

Thus, after apparently exempting all of the corporations named from all assessments or taxation upon personal property, they proceed to enact that street horse railroad companies shall not be taxed upon gross receipts.

Aside from the fact that street horse railroads are not liable

for taxes upon their gross receipts by any law, they had just exempted them and all other corporations (if the relator's claim be correct) from all taxes and assessments whatsoever.

It would seem, by the addition of such last clause, that the framer of the statute supposed, notwithstanding the broad and general exemption, that in some way these corporations had still been left subject to some tax upon their personal property.

The act is too loosely and inconsistently expressed to induce us to give it the sweeping effect which is claimed for it. A further examination of the language of the act shows that it was intended to relate to State purposes and enlist State action alone. Section 3 and others provide that certain corporations "shall be subject to and pay a tax into the treasury of the State annually." Section 9 devotes the moneys received thereunder exclusively to the payment of the current expenses of the State. The manner in which the tax upon capital and surplus earnings is to be arrived at is provided by section 1, as follows: "The president or treasurer of the corporations, etc., named shall report to the comptroller the amount of their capital stock and the amount of each and every dividend declared in the year preceding such report. In case they have declared no dividend, or if such dividends amount to less than six per cent, the secretary and treasurer are to appraise the value of their capital stock and report the same to the comptroller, who may change such valuation, if in his judgment it does not represent the fair value of such stock. The published statistics of the State for the past four years show that while the aggregate amount of State and local taxation approximates \$50,000,000, annually, the proportion thereof which is payable exclusively, as a State tax, has varied from \$3,000,000 to \$6,000,000 only. It seems improbable that the legislature intended to relieve these corporations from such a burden and throw it upon individuals when no allusion whatever is made to such a result, in the act which is intended to accomplish so important a revolution. These considerations certainly call upon us to look to all of the legitimate sources of information

accessible to ascertain the object and intent of the legislature. The title of the act thus becomes an important element in ascertaining such intent. It is entitled "An act to provide for raising taxes for the use of the State." While the term "State" is used to designate the whole body politic, comprising the people and its territorial jurisdiction, it is also some times used to designate the agencies employed in administering the government which would doubtless include within its signification local as well as the properly so called State officers. When, however, it is used in reference to the subject of taxation it is generally so used in contradistinction to the term "local," and an act which is expressly described as being intended to raise a revenue for the State would not be considered as covering the subject of a support for a local object, such as the maintenance of a fire department, a police force, the lighting streets or any of the various subjects of municipal legislation. Neither can we refrain from giving some significance to the legislation of the succeeding year. Chapter 361 of the laws of that year amended section 8 of the previous year by expressly restricting the exemption therein provided for, to taxes for State purposes alone, and thus made it accord with what the respondent now claims was its original intent. Chapter 332 of the laws of the same year purports to ratify, confirm and legalize the assessments and levy of taxes in the city of New York, upon the corporations, etc., named in the act of 1880, which had been levied in disregard of the exemption now attempted to be made under that act. While a radical change in the phraseology of an act is generally to be regarded as a legislative construction that the law so amended did not as originally framed embrace the amended provisions, yet the time when, and the circumstances under which the amendment is enacted are to be regarded in construing their effect. We think these acts are to be considered as in effect declaratory of the object and intent of the prior legislation. They certainly import an almost immediate repudiation by the law-making power, of the theory that the State intended by the legislation of 1880 to exempt the property of the corporations affected thereby from local taxation. The

force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. (*People, ex rel. Mut. Life Ins. Co. of N. Y., v. Board of Supervisors*, 16 N. Y. 431.) If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute. While a declaratory act has no conclusive force in the construction of prior statutes by the judiciary, yet it has usually been regarded as entitled to some consideration and weight. (*Costant v. People*, 11 Wend. 513; Sedgwick on Laws and Stat. [2d ed.] 214.) In this case the legislature at the heel of its sessions pass an act which the succeeding body not only change and amend, but pass an independent act expressly intended to nullify the effect claimed by the relator to flow from the act of 1880. We must regard these facts as adding great force to the doubts created by the unmeaning expressions and apparent scope and object of the act itself. Suggestions are made in the briefs for the appellants that the legislature could not have intended to exempt one tax and not the other for the reason that it would be impracticable for the local officers to sever them. It seems to us that a sufficient answer to this suggestion is afforded by the fact that for the past two years under chapter 361 of the Laws of 1881 we have been acting under a law which did sever local from State taxes, and no complaint has been made that difficulty exists in carrying it out, so far as we know. From the considerations above stated we are induced to hold that it was not the intention of the legislature by chapter 542 of the Laws of 1880 to exempt the property of the corporations and companies therein named from taxation for local purposes.

The judgment should, therefore, be affirmed.

All concur, except EARL, J., who dissents upon the first ground.

Judgment affirmed.

Statement of case.

THE PEOPLE, ex rel. THE TWENTY-THIRD STREET RAILROAD COMPANY, Appellant, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS, in the city and county of New York, Respondent.

91	508
115	458
115	454

The statutes in relation to the assessment of taxes in the city and county of New York (Chap. 302, Laws of 1859; § 4, chap. 410, Laws of 1867; § 112, chap. 335, Laws of 1873), confer no power upon the commissioners of taxes and assessments to change the record of assessments after the first day of June in any year.

It seems that none of the municipal authorities have any judicial duty to perform after that date, in relation to the assessment of property, or the collection of taxes, save the board of supervisors, and they only when it appears "under oath or affirmation that the party aggrieved was unable to attend within the period prescribed for the correction of taxes by reason of sickness or absence from the city" (§ 10, chap. 302, Laws of 1859). As, therefore, the act of 1880 (Chap. 542, Laws of 1880), providing for the taxation of certain corporations, companies and associations, was not passed until June first of that year, and as it contains no provisions giving it a retroactive effect, or providing for the contingency, it imposed no duty upon said commissioners, so far as the assessment and collection of taxes for that year were concerned.

The provision of the act of 1880 (§ 1, chap. 269, Laws of 1880) in regard to the review and correction of assessments by *certiorari* confers upon the court the power of review and correction, only when it appears by the return to the writ or the evidence taken thereunder, "that the assessment complained of is illegal, erroneous or unequal." It does not authorize a review where it appears that the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory upon the assessors.

Where, therefore, it appeared by the return to a writ of *certiorari* to review an assessment upon the personal property of the relator, which was alleged to be illegal, because of the exemption contained in the act of 1880 (Chap. 542, Laws of 1880) that the assessment was made before May 1, 1880, in accordance with the then existing law; *held*, that the assessment was properly affirmed.

(Argued January 30, 1883; decided March 13, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made January 10, 1883, which affirmed an order of Special Term, affirming the pro-

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ceedings of the commissioners of taxes and assessments of the city and county of New York, in assessing the capital stock of the relator for the year 1880, which proceedings were brought up for review by writ of *certiorari*.

The facts, so far as material, appear in the opinion.

John H. Strahan for appellant. No assessment of the capital stock of the relator for the purpose of taxation in the city of New York could be lawfully made for the year 1880. (Laws of 1880, chap. 542, § 8; 1 Laws of 1880, p. 767; 1 R. S. [Edm. ed.] 361-368, 374-78; id. 360, § 3; 375, § 6; 374, § 1; 376, § 6; 2 Laws of 1857, chap. 456, § 3, p. 2.) In the city and county of New York the mandatory powers of assessment and taxation were conferred exclusively upon the local authorities of the city. (Laws of 1869, chap. 302, p. 678; 1 Laws of 1867, chap. 410, p. 981; Laws of 1873, chap. 335, § 87, p. 507; id., p. 518, § 112; Laws of 1874, chap. 304, § 3, p. 360.) By the statute of 1880, the legislature having made provision by direct assessment and tax for purposes of the State, the particular property thus, as it were, specially appropriated to bear this taxation was, as a consequence of the burden so imposed, relieved from assessment and taxation by the local authorities. (Laws of 1880, chap. 542, § 8; Laws of 1859, chap. 302, § 12.) The legislature having in plain and unambiguous language declared that the assessment and taxation of the capital stock and personal property of the corporations mentioned in the statute (Chap. 542 of the Laws of 1880), were thereafter exempt from assessment and taxation by the local authorities, the relator is entitled to have the assessment of its capital stock made by the local authorities for 1880 vacated and set aside. (*People, ex rel. Westchester F. Ins. Co., v. Davenport et al.*, 25 Hun, 630.) The respondents having, by the provisions of the statute of 1880, been deprived of all jurisdiction over the capital stock and personal property of the corporations mentioned therein, in the matter of assessment for taxation; any assessment by them of such property

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for taxation was void, and subsequent confirmation would not validate the same. (Laws of 1881, chap. 332, p. 454; 82 N. Y. 210.)

S. B. Brownell, Julien T. Davies, George Richards, John O. Heald, Edward Lyman Short for corporations similarly situated with appellant. The tax commissioners had power over the contents of the assessment-rolls up to July 1. (*N. Y. Life Ins. Co. v. B'd Supervisors*, 1 Hoff. Laws, N. Y. 590; *N. Y. Life Ins. Co. v. B'd of Supervisors*, 5 Duer, 192; *Washington, etc., Church v. Mayor*, 20 Hun, 295; *People v. Supervisors*, 15 Barb. 607; *Westfall v. Preston*, 49 N. Y. 353; *Boyd v. Gray*, 34 How. Pr. 326; *Mygatt v. Washburn*, 15 id. 319; *Whitbeck v. Van Rensselaer*, 3 Seld. 517.) The word "hereafter" in section 8 means from June 1, 1880. (*So. Hotel Co. v. City Court*, 62 Mo. 134.) The exemption is total. (*LeFrance v. City of New Orleans*, 27 La. Ann. 186; *Osborn v. N. Y. & N. H. R. R. Co.*, 40 Conn. 491; *N. Y., etc., R. R. Co. v. Sabin*, 26 Penn. St. 242; *County of Lackawanna v. Nat. B'k*, 94 id. 221.) *Certiorari* will lie before the commissioners part with the rolls, but not after. (*People v. Commissioners*, 43 Barb. 494; *People v. Reddy*, id. 540; *People v. Delaney*, 49 N. Y. 655; *People v. Commissioners*, 9 Hun, 609.) There is no taxation until tax is extended upon rolls. (*Washington, etc., Church v. Mayor*, 20 Hun, 297; *Skidmore v. Hart*, 13 id. 444; *Fisher v. Mayor*, 67 N. Y. 73; *Downey v. May*, 54 id. 186.) The power of the legislature over municipal taxation is complete. (*State v. Ry. Co.*, 9 Mo. App. 532; *State v. Beaver*, 64 Ala. 295.) Equality of taxation is a fundamental principle. (*People v. B'd of Supervisors*, 20 Barb. 88; *State v. Township Comm'rs*, 36 N. J. 66; Cooley on Constitutional Lim. 493, 515.) The State has nothing to do with individual tax payers (*County Schuylkill v. Comm'rs*, 36 Penn. St. 524). Laws of 1881, chap. 332, § 1, so far as it is a legislative construction of section 8, is only an argument. (*People v. B'd of Supervisors*, 16 N. Y. 431; *People v. Wilson*, 3 Hun, 441; *Hardcastle*, 68; *Koshkomey v. Burton*, 104 U. S.

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668; *Bingham v. B'd of Supervisors*, 8 Minn. 449.) The assessment of exempt property is without jurisdiction and void. (*Nat. B'k v. City of Elmira*, 53 N. Y. 49; *Matter of Protective*, 77 id. 344; *Williams v. B'd of Supervisors*, 78 id. 563.) The legislature cannot confirm such an assessment. (*Tiff v. City of Buffalo*, 82 N. Y. 254; *Hopkins v. Mason*, 61 Barb. 469; *Matter of Van Antwerp*, 56 N. Y. 261; *People v. McDonald*, 69 id. 362; *Horton v. Thompson*, 71 id. 513; *Ireland v. City of Rochester*, 51 Barb. 431; *Matter of Turflen*, 44 id. 53; *Doughty v. Hope*, 3 Denio, 599; *A. & N. R. R. Co. v. Maquillin*, 12 Kans. 301; *People v. Goldtrees*, 44 Cal. 323; *Nelson v. Rountree*, 23 Wis. 367; *Abbott v. Lindenbower*, 42 Mo. 162; *Young v. Taylor*, 12 N. W. 208; *Halls v. Helmer*, 12 Neb. 94.) There being no ambiguity, the language of section 8 must be followed. (*Melter v. Kirkpatrick*, 29 Penn. St. 229; *Matter of Second Ave.*, 66 N. Y. 395; *Johnson v. Hudson River R. R. Co.*, 49 id. 462.) The rule that exemptions should be construed strictly has no application. (*R. R. Co. v. Laflin*, 105 U. S. 261; *Bank v. Tennessee*, 104 id. 495; *City of St. Paul v. St. Paul R. R. Co.*, 23 Minn. 469; *State v. Whitworth*, 8 Lea, 606; *Hoye v. R. R. Co.*, 99 U. S. 355.)

George P. Andrews for respondent. The argument that if the relator is required to pay taxes in this city for the year 1880, it will be subject to double taxation, is unsound. (Cooley on Taxation, 164.) The taxes levied in the city of New York in the year 1880, upon the relator and other corporations for both local and State purposes, were legalized and confirmed by chapter 332 of the Laws of 1881. (Cooley on Taxation, 228; *Grim v. Weissenberg School District*, 57 Penn. St. 433; *Tucker v. Justices of Inferior Court*, 34 Ga. 372; Laws of Indiana for 1865, p. 126; *Oliver v. Keightley*, 24 Ind. 514; *Board of Comm'rs of Miami Co. v. Bearss*, 25 id. 110; *Coffman v. Keightley*, 24 id. 509; *Comer v. Folsom*, 13 Minn. 219; Laws of Minnesota for 1865, chap. 53, p. 111.) The relator was taxable in the year 1880 for local, even if it was not for State purposes. (11 N. Y. 601; Sedgwick on Stat. and Const.

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LAW, 38; *People v. Molyneux*, 40 N. Y. 113; *Bishop v. Barton*, 2 Hun, 436; *S. C.*, 64 N. Y. 637.) By section 8 of chapter 542 of the Laws of 1880, the relator was exempted from taxation for State purposes, but not from taxation by the local authorities. (*O. & A. R. R. Co. v. City Council of Alexandria*, 17 Gratt. 176; *Humphreys v. City of Norfolk*, 25 id. 97; *W. U. Tel. Co. v. City of Richmond*, 26 id. 1; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Ins. Co. v. New Orleans*, 1 Woods, 85; Cooley on Taxation, 146-151.)

RUGER, Ch. J. This appeal was argued in connection with the case of *The People, ex rel. The Westchester Fire Insurance Company, v. Gideon W. Davenport and other trustees of the Village of New Rochelle*, and so far as the questions involved in both cases are identical, was determined by our decision therein. That decision, however, did not embrace all of the questions presented by this appeal and we are, therefore, required to consider such additional questions. In this appeal, it is claimed upon the part of the respondent, that chapter 542 of the act of 1880 did not impose any duty upon the commissioners of taxes and assessments in the city of New York so far as the assessment and collection of taxes for that year was concerned, because their assessments had, at the time of the passage of the act, been wholly completed and placed beyond the power of the board of commissioners to alter and correct.

The further point is made that the legislature, by chapter 332 of the Laws of 1881, legalized and confirmed the assessment and collection of taxes on the personal property of the companies and corporations named in chapter 542 of the Laws of 1880, in the city of New York for the preceding year.

Inasmuch as we have held that the exemptions provided for by the law of 1880 applied only to the assessments for State taxes, the examination of these questions is important only so far as they affect the assessment for State taxes upon the property of the relator for the year in question. Those taxes amount to only a small part of the levy complained of. The total valuation for personal property

against the relator on the assessment for the year in question was \$85,000, of which the proportion due to State tax was about one-tenth only. The petition of the relator alleged that it objected to such assessment while the books of the commissioners were open for correction and examination; that the commissioners made such assessment after the passage of the act (Chap. 542 of the Laws of 1880), and asks that said assessment should be vacated.

The return of the defendant made to the writ of *certiorari* in this case alleges that the assessment was based upon a statement of their personal property, dated April 26, 1880, prepared and delivered by the relator to the board of commissioners and was completed by them before the 1st day of May, 1880; that copies of such assessment were, in accordance with the law, made by them and delivered to the board of aldermen of the city of New York on the 1st Monday of July, 1880. The writ of *certiorari* herein was issued and presumably served on the 16th day of July, 1880. The case was brought to a hearing before the Special Term upon the petition and return. This proceeding admits all of the allegations of fact contained in the return, and raises only the question of law as to the time when the power of the commissioners to make corrections of the assessment-roll legally terminated. As it is alleged in the return that the assessment in question was actually made before the 1st day of May, 1880, we must assume that it was made at that date and at least one month before the passage of chapter 542, under which exemption is claimed.

It is evident, therefore, that the assessment in question was made in accordance with the statutes in force when it was made and in the due performance of the duty then obligatory upon the commissioners, and that no allegation of illegality can be predicated upon the entry of such assessment upon the book of record. The only question, therefore, if any, presented by the relator upon this appeal is whether the defendant omitted the performance of some duty after June 1, 1880, which the law imposed upon it.

The solution of this question necessitates the examination

of the various statutes prescribing their several powers and duties. Chapter 302 of the Laws of 1859, section 7, provides that the deputy tax commissioners of the city of New York shall, under the direction of the board of commissioners of taxes and assessments, on the first Tuesday of September in each year, commence the assessment of the real and personal property of the tax payers in said city. These assessments are to be completed and entered in a book called "the annual record of the assessed valuation of real and personal estate," by the second Monday of January in each year. Such books are required to be open for examination and correction from said second Monday in January until the first Monday of May thereafter, when they are directed to be closed, to enable the commissioners of taxes and assessments to prepare assessment-rolls of the several wards for delivery to the supervisors. Section 9 provides that the commissioners shall, prior to said second Monday of January, and during the time such books are required to be kept open, advertise the fact that they are thus open for examination and correction. Section 10 provides that during the time such books shall be kept open any person feeling himself aggrieved by any assessed valuation of his real or personal property may apply to have the same corrected.

The commissioners are required to declare their decision on all such applications within thirty days from the time when they are made.

Section 11 provides that the commissioners may, at any time before the first day of May in each year, increase or diminish the assessed valuation of any real or personal property in said city as in their judgment may be necessary for the proper equalization of assessments.

Section 12 requires the commissioners on the first day of May in each year to cause to be prepared assessment-rolls for each of the wards of said city and to certify that the same are correct in accordance with the entries in said books of record.

Section 13 directs that such ward assessment-rolls shall be delivered by said commissioners of taxes to the supervisors

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of the city and county of New York on the first Monday of July in each year, and requires the supervisors to be present at the City Hall on that day to receive them.

Section 20 provides that a *certiorari* to review and correct on the merits any decision or action of the said commissioners under section 10 or 11 of said act, may be allowed by the Supreme Court or a judge thereof.

Section 10 prohibits the board of supervisors from making a reduction of any assessments imposed under this act except upon the oath of the party complaining, stating that he was unable to attend, by reason of sickness or absence from the city during the period prescribed for the correction of taxes.

Section 4 of chapter 410 of the Laws of 1867 provides: That the commissioners of taxes and assessments are authorized to correct and remit any tax imposed on real or personal estate on account of any error in entering the same, but such power shall be exercised only within the time now allowed by law for the remission and reduction of taxes. By section 112 of chapter 335 of the Laws of 1873 it is provided that the board of estimate and apportionment of the city, in connection with the board of aldermen, between the first day of August and the first day of November in each year, shall estimate and fix the amount necessary to be raised by tax to pay the expense of conducting the public business of the city and county of New York and file the same in the office of the comptroller. This amount is to be certified by the comptroller to the board of supervisors, who are required to cause the same to be raised and collected by tax upon the real and personal property in said city subject to taxation. Section 3 of chapter 304 of the Laws of 1874 devolves the powers and duties of the board of supervisors of the county of New York upon the board of aldermen of the city of New York.

It seems to us entirely clear, from the simple reading of these various provisions, not only that no power is conferred upon the commissioners of taxes to change the record of assessments after the first day of May in any year, but that they are forbidden from exercising such power after that date unless it

may be held that the provision requiring them to declare their decision upon any application to reduce taxes within thirty days after such application is made, by implication extends their power to the following 30th day of May. But even if we should hold that such was the effect of that provision it would not benefit the relator in this case, as that period had also expired before the passage of the act of 1880. It is, therefore, unnecessary now to decide that question. Not only are the commissioners of taxes precluded either by express provisions or necessary implication from making alterations in the record after such date, but by section 10, chapter 302 of the act of 1859, the board of supervisors are also expressly prohibited from making any reductions whatever from any assessments on real or personal property except in the special case mentioned in that section.

From a brief review of these provisions the duties and the powers of these commissioners are plainly seen and difficult to be misunderstood.

The sole purpose for which the assessment-rolls are left in their possession after May 1st is declared by the statute to be to enable them "to prepare assessment-rolls of the several wards for delivery to the supervisors." It is especially provided that these books shall be open for "examination and correction," from the second Monday of January to the 1st day of May in each year, and by settled rules of construction, such examination and correction is thereby impliedly prohibited after that period to tax payers and commissioners respectively.

It was even thought necessary by the legislature to authorize the commissioners by an express provision to increase or diminish any such assessed valuation for purposes of equalization up to the 1st day of May in each year, and from this provision the implication necessarily arises that they would not otherwise have had that power after the second Monday of January.

They are also required by section 12 to cause to be prepared on the 1st day of May in each year, ward assessment-rolls which they are directed to certify as correct in accordance with the entries in said books of record. A compliance with

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this provision would be impossible if the records were altered after that period, and it is manifestly inconsistent with any existing power in the commissioners to alter or change such record. The general law applicable to counties other than New York authorizes and directs the assessors in such counties in the months of May and June in each year, to make the necessary inquiries and to ascertain the names of the taxable inhabitants and the property liable to taxation in their respective districts, and make up a roll embracing such persons and property. By express provision, the assessors are required to advertise on the 1st day of August in each year, that the roll is complete and open for examination, and that they will meet on the third Tuesday of August thereafter to review and correct their assessments. This roll is required to be delivered to the supervisors on the 1st day of September.

Thus either by express authority or necessary implication town and ward assessors, other than those in New York, have until September 1st in each year to review and correct their assessments.

Under these statutes, it has been held in this court, that the taxable status of persons and property becomes fixed on the 1st day of July in each year, and that no power exists to enter property thereafter acquired upon the roll or to change an assessment theretofore made on account of any transfer of title. (*Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 id. 264.) The period corresponding to the duties of assessors in the months of May and June in making assessments outside of the city of New York would seem to lead to the conclusion that the taxable status of persons and property in that city would be determined on the second Monday of January in each year. This view would also harmonize with the special provisions in the statutes conferring power upon the tax commissioners to change the roll for special reasons after that period. A further examination of the legislation on the subject applicable to that city confirms our views. The Laws of 1867 (Chap. 410) contain an express prohibition to the commissioners from remitting or reducing any tax imposed on real

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or personal estate on account of any error occurring in the entries of the valuation of such property upon the assessment-rolls, unless such remission or reduction be made within the time allowed by law for the exercise of such power.

The duty of certifying to the ward assessment-rolls after they are made to conform to the book of records is enjoined by statute and is the performance of a mere ministerial act, a refusal to do which would subject the commissioners to punishment as for a neglect of official duty.

In view of the express limitations upon their power imposed by statute, no implication could arise from the fact that they were allowed until the 1st day of July to prepare the ward rolls, and certify them to the supervisors, that their power to alter them was extended to that date. The examination of these statutes shows conclusively that none of the authorities of the city of New York had any judicial duty to perform in relation to the assessment of property or collection of taxes after the 1st day of May, except in the single instance provided for by section 10 of the Laws of 1859.

This provision necessarily implies not only that the board of supervisors are, after the 1st day of May, the only officers having authority to change the record, but also that they have this power in no other case. We have carefully examined the various authorities cited by the numerous and learned counsel employed by the relator and other corporations similarly situated, and can find none which even remotely authorize us to hold that public officers can be chargeable with the duty of performing an act which a statute not only does not expressly authorize, but which it either expressly or impliedly prohibits.

The case of *The People, ex rel. Metropolitan Bank, v. Commissioners, etc.* (43 Barb. 494), arose before the passage of chapter 410 of the Laws of 1867, and the question as to whether the power of the commissioners of taxes to correct the assessment record expired on the 1st day of May or on the 1st of July was immaterial in that case and was not discussed.

The statute (Chap. 269 of the Laws of 1880) undoubtedly greatly enlarged the power previously exercised by the court

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in reviewing and correcting illegal assessments by *certiorari*, but even by that statute the power of the court is confined to those cases where it appears by the return of the writ, or the evidence taken thereunder, "that the assessment complained of is illegal, erroneous or unequal for any of the reasons alleged in the petition."

It is there provided that "the court shall have power to order such assessment, if illegal, to be stricken from the roll, or if erroneous or unequal, to order a reassessment of the property of the petitioner." No claim is made on behalf of the relator that this assessment is erroneous or unequal in such a sense as to authorize the court to order a reassessment, but the claim is that the assessment was altogether illegal on account of the exemption contained in the act of 1880, and that it was their duty to strike it from the assessment-roll on the passage of that act. This claim we have seen cannot be supported for the reason that the assessment as originally made was authorized by law and they had no power, and it was therefore no part of their duty, to correct the assessment after May 1st.

The *certiorari* authorized by section 20 of the act of 1859 is expressly confined to a review of alleged erroneous decisions made under the powers conferred by sections 10 and 11 of that act. The action of the commissioners under these sections is confined to the period between the second Monday of January and the first of May in each year. It must, we think, be assumed that the legislature was acquainted with the law regulating the time of making assessments for the collection of taxes in the city of New York, and were aware of the fact that no municipal officer in that city had the power of enforcing the exemption provided by chapter 542 of the act of 1880, and since it did not provide for such a contingency we must infer that it did not intend that the act should apply to the tax levy in that city for that year.

The act must be construed to have a prospective operation, and to become operative and binding upon the officers having charge of the duty of assessing and levying taxes only when the occasion for its exercise arises and when they are charged

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with the performance of some prospective official duty in relation thereto.

In the city of New York no discretionary duty was left to be performed after June 1, 1880, by any municipal officer in relation to the assessment and collection of taxes, except in the single instance hereinbefore spoken of. Without the aid of additional legislation effect could not be given to the exemption provided by the act of 1880 in that city. This result is the more gratifying from the fact that otherwise great injustice would be done in the city of New York in the collection of State taxes for the year 1880. Their payments into the State treasury always precede the collection of taxes, and in this case the money to pay them was borrowed upon the bonds of the city and mainly paid into the treasury before the passage of this exemption act.

This result places the city upon terms of equality with the other counties in the State, inasmuch as in the latter case the payment into the treasury of the State always follow the collection of their taxes.

The conclusion reached on this point renders it unnecessary to examine the question as to the effect of the confirmatory act of 1881.

The order should be affirmed, with costs.

All concur.

Order affirmed.

THOMAS S. SCOTT, Respondent, v. CHARLES STEBBINS et al.,
Executors, etc., Appellants.

The will of H. gave to his two sons each an undivided half of certain real estate: to his son A. a legacy of \$5,000; to his son J. \$2,000, and discharged him from all indebtedness for sums advanced, thus, as the testator declared, making the shares of his two sons equal. After certain specific bequests and legacies he gave the rest and residue of his estate, real and personal, to S., one of his executors in trust *First*,

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to pay the interest, or so much thereof as should be necessary to the support of the testator's father during life. *Second*, to pay out of the proceeds of said residuary estate to the O. C. Seminary \$15,000, and the balance with any unexpended income to the two sons in equal proportions. The executor was empowered to sell as he should think just. The testator inventoried his personal property about a month before he made the will at \$22,500. He thereafter purchased real estate, built a house upon his lands, etc., and the proceeds of the personalty remaining at his death after the payment of debts amounted to but about \$2,000. *Held*, that the legacy given to A. was chargeable upon the residuary real estate.

Lupton v. Lupton (2 Johns. Ch. 614), distinguished.

Also *held*, that an action to have said legacy declared a lien upon the residuary real estate was properly brought within ten years after the cause of action arose; that the six years' statute of limitations did not apply.

The executors brought an action for the construction of the will. F., to whom A. had assigned his legacy, was made a party; he had, however, before the commencement of the action, transferred it to D. In that action it was adjudged that the legacy was not chargeable upon said real estate. *Held*, that said judgment was not a bar to this action, and this, although D. subsequently reassigned to F.

(Argued February 2, 1883; decided March 13, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made the second Tuesday of June, 1882, which reversed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 27 Hun, 335.)

This action was brought against defendants as the executors of, and against defendant Stebbins as trustee under, the will of Russell F. Hicks, deceased, to have a legacy of \$5,000 given by said will to A. Hammond Hicks, declared a lien on the lands devised by said will to said trustee, and paid out of the proceeds thereof. The answer aside from a denial that the legacy in question was chargeable upon the real estate, set up in bar a former judgment in an action brought by the defendants for a construction of the will and also the statute of limitations. The testator died on the 29th of August, 1869, leaving a will, executed on the 2d of January preceding, which contained the following provisions: "*First*, I give and bequeath to my son, A. Hammond Hicks, in addition to any sum heretofore

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given him, the equal undivided half of my lands in Iowa; also my watch, seal and rings, and I do further give and bequeath to my said son the sum of \$5,000, payable one year after my decease. *Second*, I give and bequeath to my son John F. Hicks, the remaining equal, undivided one-half of my lands in the State of Iowa, and I do discharge him from all indebtedness to me for sums heretofore advanced, and I bequeath to my son John Frank Hicks the sum of \$2,000, to be paid to him by my executors when he shall arrive at the age of twenty-five years, with interest from the time of my decease, making the shares of my sons equal in my judgment." Then follow certain specific bequests and two legacies, one of \$1,000 and one of \$2,000. The concluding clauses are as follows: "*Seventh*, I give, grant, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, not herein effectually disposed of, which I may own at the time of my decease to Charles Stebbins, Jr., of Cazenovia, in trust for the following purposes, viz.: first, to apply the interest thereof, or so much thereof as may be necessary to the comfortable support of my father during his natural life; second, upon and after the death of my said father, out of the proceeds of said residuary estate to pay to the Oneida Conference Seminary, located at Cazenovia, the sum of \$15,000, and to pay the balance of said residuary estate with any unexpended income thereof, if any, to my said two sons, share and share alike, and I authorize and empower said Stebbins to sell and dispose of said property herein devised and bequeathed to him in trust, at public or private sale and upon such terms and conditions as he may think best for the purposes aforesaid. *Eighth*. I do hereby nominate and appoint Charles Stebbins, Jr., of Cazenovia, James J. Belden, of Syracuse, and Artemus Baum of Clay, executors of this, my last will and testament."

In December prior to his death the testator inventoried his personal property at \$22,500. Included in this was a deposit in a savings bank stated at \$8,546. At the time the will was executed he had on deposit \$7,790.57, and at the time of the

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death, \$323.69. After the execution of the will the testator bought some real estate, which formed part of his residuary estate, for \$4,000; he paid \$500 and gave his note for \$3,500, which was paid by the executors out of the proceeds of the personal property. The executors realized from the sale of the personalty \$10,649.44. The testator left debts to the amount of \$6,775, nearly all of which the court found were incurred after the execution of the will. After the payment of debts, expenses, etc., there remained of the proceeds of the personalty \$1,979.98, which was applied ratably in payment of the legacies.

In 1870 the executors commenced an action for a construction of the will. Prior to that time A. Hammond Hicks had assigned his legacy to one Ferguson, and the latter had assigned it to one Duffany. Ferguson was made a party to the action, but Duffany was not, the executors having no knowledge of the assignment to him. A judgment was entered in that action adjudging the legacies to the two sons of the testator, not to be chargeable upon the residuary real estate. After the entry of that judgment Duffany reassigned the legacy in question to Ferguson, who assigned it to plaintiff.

W. E. Lansing for appellants. Legacies of money are to be paid from personal property, and if the personal estate is insufficient therefor, the legacies are to abate unless the real estate is charged with their payment. (*Hoyt v. Hoyt*, 85 N. Y. 142; *Bevan v. Cooper*, 72 id. 317; *Taylor v. Dodd*, 58 id. 335; *Reynolds v. Reynolds*, 16 id. 257; *Harris v. Fly*, 7 Paige, 421.) The usual clause devising all the rest, etc., of the testator's real and personal estate not before devised is not sufficient, nor is the mere direction that all debts and legacies be paid to show an intention to charge the legacy upon the real estate. (*Lupton v. Lupton*, 2 Johns. Ch. 614; *Harris v. Fly*, 7 Paige, 425; *Shulters v. Johnson*, 38 Barb. 80, 84; *Keeling v. Brown*, 5 Ves. 359; *Myers v. Eddy*, 47 Barb. 264; *Babcock v. Stoddard*, 3 T. & C. 207; *Bevan v. Cooper*, 7 Hun, 117, 121; 72 N. Y. 325; *Ragan v. Allen*, id. 537;

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Gallager's Appeal, 48 Penn. St. 123; *Gridley v. Andrews*, 8 Conn. 1; 2 Jarman [2d ed.], 534; *Greenville v. Brown*, 7 H. of L. Cas. 688; 85 N. Y. 149; *Shulters v. Johnson*, 38 Barb. 84; *Hoyt v. Hoyt*, 85 N. Y. 142, 151, 152.) No inference can be drawn that the testator intended to charge his real estate with the payment of the legacies, from the fact that he expected the legacies would be paid; nor from the fact that he designed to have his sons share equally. (*Bevan v. Cooper*, 72 N. Y. 322, 323.) What the testator did after the making of the will, in changing his property from personal to real, is not competent to show an intent to charge the real estate, or for any other purpose. (1 Jarman [5th ed.], 422, note 2; *Myers v. Eddy*, 47 Barb. 246.) Nor can the fact that no provision was made in this will for payment of debts indicate an intent to charge the real estate. (*Taylor v. Dodd*, 346, 347.) There is no reason why a pecuniary legacy should take effect sooner than a devise of lands. (*Bevan v. Cooper*, 7 Hun, 121; 72 N. Y. 322, 323.) The action against the executors was barred by the statute after six years. (3 R. S. 123, § 9 [6th ed.]; *Am. B. Soc. v. Hebard*, 51 Barb. 576; *Smith v. Remington*, 42 id. 75; *Borst v. Cary*, 15 N. Y. 505; 2 Paige, 577; 2 Redf. 307; 3 Keyes, 372; *Loder v. Hatfield*, 71 N. Y. 92.)

W. G. Tracy for respondent. When legacies are bequeathed generally and "all the rest and residue of the estate" is given in one mass, the legacies are a charge upon the residuary real as well as the personal estate, unless a contrary intention is necessarily to be inferred from other parts of the will. (*Hoyt v. Hoyt*, 85 N. Y. 142; 17 Hun, 183; *Bevan v. Cooper*, 72 N. Y. 317; *Tracy v. Tracy*, 15 Barb. 503.) Where the real and personal estate of the testator have been blended in one fund, and the words "not herein effectually disposed of" are added to the usual residuary clause, the legacies are a charge upon the real estate. (*Hassell v. Hassell*, 2 Dick. 527; *Day v. Day*, 19 N. J. Eq. 137; *Rafferty v. Clark*, 1 Brad. 473; *Hoyt v. Hoyt*, 85 N. Y. 146; *Carroll v. Hargrave*, 5 Irish Eq. 127, series 1867.) A strong presumption that the testator did

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not intend to charge his real estate with the payment of these legacies is necessarily to be inferred from the fact that the legatees were the favorite children of the testator, and the residuary devisee a complete stranger to his bounty. (*Van Winkle v. Houter*, 2 Green's Ch. [N. J.] 187; *Wardle v. Halfpenny*, 2 P. Wms. 153; *Myers v. Eddy*, 47 Barb. 263; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Bevan v. Cooper*, 72 N. Y. 317.) The prior specific devise of real estate in this will does not tend to show that the testator did not intend to charge the real estate. (*Myers v. Eddy*, 47 Barb. 263; *Snow v. Darling*, 16 How. [U. S.] 1; *Bevan v. Cooper*, 72 N. Y. 325-6.) When a legacy is directed to be paid by the person to whom the real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is also the devisee of the real estate. (*Brown v. Knapp*, 79 N. Y. 136, 143; *Harris v. Fly*, 7 Paige, 425.) This action is not barred by the six years' statute of limitation. (*Jones v. Hughes*, 6 Exch. 223; *Clark v. Riddell*, 11 S. & R. 313; *Patton v. Walker*, 1 Jacob & W. 189; *Elwood v. Diefendorf*, 5 Barb. 397; *Tole v. Hardy*, 6 Cow. 333; *Kelsey v. Western*, 2 Comst. 500, 508.) The judgment recovered by the defendants against Samuel Ferguson and others in the suit for the construction of the will is not a bar to this action. (*Duffany v. Ferguson*, 66 N. Y. 482; *Boerum v. Schenck*, 41 id. 183.) It is only when some relief is sought by the *cestui que trust* against the trustees, or their respective rights in the fund are the subject of contention, that they are the proper parties to an action concerning the fund. (*Mead v. Mitchell*, 5 Abb. 92; *S. C.*, 17 N. Y. 210; *Miller v. Fire Ins. Co.*, id. 609; *Western R. R. v. Nolan*, 48 id. 513.)

MILLER, J. The testator by his will bequeathed to his son, A. Hammond Hicks, the undivided half of certain real estate situate in Iowa, and also a legacy of \$5,000, payable one year after his decease. The other son he gave the other undivided half of the real estate in Iowa, a legacy of \$2,000, and discharged

him from certain debts. Certain other legacies are made, and then the testator devised and bequeathed all the rest, residue and remainder of his estate, both real and personal, "not herein effectually disposed of, which I may own at the time of my decease, to Charles Stebbins, Jr., of Cazenovia, in trust" * *
* *First.* For the support of his father during his life, and *Second.* Upon the death of his father, out of the proceeds of said residuary estate to pay to the Oneida Conference Seminary the sum of \$15,000, and to pay the balance thereof to his two sons, share and share alike. He also authorized the said trustee to sell and dispose of the property devised and bequeathed to him, for the purposes named in the will.

The question presented is, whether under a proper construction of the will, the legacy of \$5,000 to testator's son, A. Hammond Hicks, is chargeable upon the real estate. The defendants claimed the legacy in question is not made chargeable upon the real estate by the terms of the will, and they rely upon certain authorities which, it is insisted, control the construction to be placed upon the will. The case of *Lupton v. Lupton* (2 Johns. Ch. 614) is the leading authority for the defendants upon the question here presented. In that case the testator, after leaving to his widow the use of his real and personal property during widowhood, gave certain legacies to his three grandchildren; he also devised certain lands to said three grandchildren and provided for their education, until they arrived at lawful age, out of the rents and profits of the real estate devised to them. After the decease or marriage of his widow he devised all the rest, residue and remainder of his estate to his three children. It was held that the real estate could not be charged with the payment of the legacies. The decision was placed upon the ground that this could not be done unless the intention of the testator to that effect was expressly declared or clearly to be inferred from the language of the will. In that case the residuary devisees were the children of the testator, and the legatees were his grandchildren, a fact which might, and no doubt did, have a controlling effect upon the mind of the testator and upon his intention not to make the

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real estate chargeable with the legacies. Considering the devises which had been made in the will, the provision made therein for his grandchildren by devise of real estate, and all the circumstances surrounding the case, it is not unreasonable to hold that the testator could not have intended to make the legacies a charge upon the real estate disposed of in the residuary clause. There is a marked distinction between that case and the one at bar. The legatee here was one of the testator's sons, and the devises to him and to the other son in connection with the amount of the legacy to each and the reason given for fixing the same evinces an intention to make both equal. This could not be effected unless their legacies were paid in full, for after the payment of the \$15,000 to the seminary a larger portion of the legacy in question would remain unpaid, and, in this way, the legatee of the larger amount would receive a less sum than his brother who, in fact, had already received a large portion of his legacy by reason of a discharge from the debts he owed the testator. This clearly could not have been intended, and it raises the presumption that the testator designed the real estate should be made chargeable with the payment of the legacies. The language employed in the will in question is far stronger than in the case of *Lupton v. Lupton*. Aside from the fact that the legatees here are children, instead of grandchildren, as in *Lupton v. Lupton*. The residuary estate, both real and personal, constitutes a single fund; out of this fund the legacy of \$15,000 is to be paid, and the remainder to be divided between the two sons to whom previous legacies had been given. To carry out the purpose of this trust the real and personal property are placed upon the same basis, and the evident intention is that the trustee shall dispose of what remains, after satisfying all prior bequests, by the payment of the \$15,000, if there is sufficient for that purpose, and of the surplus, if any, to the two sons. The presumption is that the testator did not intend to give a preference to an object of charity or benevolence over the claims of his own children. The contest here is between a complete stranger and his own son. No inference is to be

drawn in favor of the former, except what necessarily and naturally arises. Every intendment is in favor of the son of the testator; his own blood and kin were the first objects of his bounty, and it is to be presumed that the legacies to them were to be first paid; any other conclusion must lead to the inevitable inference that the testator intended to give a preference to a stranger that had no special claim upon him, over his own kindred and lawful heirs. It is but fair to assume that such was not his intention. The differences we have pointed out between the case of *Lupton v. Lupton* and this case are of such a marked and distinct character that it would be going very far to hold that the case at bar should be controlled by the case cited.

A number of cases are cited by the appellants' counsel to sustain the doctrine laid down in *Lupton v. Lupton*, but with the views we have taken, that this authority is not controlling in the case under consideration, we do not deem it necessary to examine them at length. Special reliance, however, is placed by the learned counsel for the appellants upon the case of *Bevan v. Cooper* (72 N. Y. 317). It is there laid down in the opinion that "no case in this State has gone so far in inferring from the usual residuary clause an intent to charge legacies upon lands, as to find it where there has been a prior devise of specific real estate." Even if this be the case it by no means follows that cases may not arise where the intention is so plain, under the circumstances, as to leave no question in regard to the same. This, we think, is the fact in the case at bar, having due regard to the provisions of the will, and their proper construction, from the surrounding circumstances. It will appear upon examination that the cases holding that a prior devise of real estates satisfies the residuary clause, and repels the implication of a purpose to charge the real estate, are those in which the residuary clause is in the usual form, and have no application where the residuary clause comprehends the two classes of property, and unites them together as one simple fund. In *Lupton v. Lupton* it does appear that there had been a previous devise of real estate, but this fact is not

referred to in the decision. So far as we have been able to ascertain there is no case in this State adjudging real estate not chargeable with the payment of legacies, solely on the ground of a previous devise. Some authorities are cited from other States, but we do not deem it necessary to examine them. The case of *Carroll v. Hargrave* (5 Irish Eq. 123, series 1870) holds that in such cases legacies may be charged upon the real estate.

We think that neither the circumstances surrounding the testator, nor the terms of the will, indicate an intention to exonerate his real estate from the payment of the legacy in question. The presumption is he meant the legacy to be paid; that he did not intend to go through the mere form of bequeathing a legacy to his own son without leaving something to pay it with. He evidently intended the legacy should be paid, under all circumstances, and it would be a mockery and an absurdity to impute to the testator an intention that the legacy given to his son should not be paid if his personal estate was insufficient for such a purpose. The will was made in January, 1869. At that time the testator was the owner of considerable personal property which he had inventoried the December previous at a large amount. Had he kept up this amount it might well be urged that it was his intention the legacies should be paid out of the personal estate alone. It appears, however, that he bought some real estate, upon which he paid the sum of \$500, and owed \$3,500, which was paid by the executors; that he also built a house on his land, the cost of which was not proved. In January he had a balance in the savings bank of about \$8,000, which he reduced before his death the following August to about \$300, and he left debts to the amount of \$6,775, nearly all of which the court found were incurred after the execution of the will, and it is manifest that his estimate of the value of the personal property was very much exaggerated, the executors realizing only about one-half his inventory amount from it, leaving after the payment of debts about \$2,000 to pay legacies amounting to \$10,000. It is evident he must have known and intended that his personal

property would not be charged alone with the payment of the legacies. The reduction of his personal property and the increase of his real estate evinces that he must have regarded the latter as chargeable with the legacies. In the face of these facts it is not to be assumed that the testator would have disposed of his personal property to the detriment of his children and for the benefit of the seminary. There is no hypothesis upon which it can be claimed that the testator intended the legacy of \$15,000 should be paid before the legacy in question.

A point is made that this action is barred by the statute of limitation. As the action is an equitable one, and was brought within the period required for the commencement of such suits, we think there is no force in this objection. The subject is fully considered in the opinion of the General Term, and does not require elaboration. Nor is there any force in the objection that the judgment recovered in the action brought by the executors for the construction of the will is a bar to this action. Ferguson, who was a party there, was not at that time the owner of the legacy, and as the owner was not a party he should not be deprived of his rights. The fact that the executors had no knowledge of the assignment does not alter the case, nor did the failure of Ferguson to allege that fact deprive the owner of his rights. Even although Ferguson subsequently took an assignment of the legacy from Duffany, as he was not the owner, at the time, the judgment could not affect him. He acquired a new and different title from Duffany, the owner, and the judgment did not reach such title, or in any way impair its validity, and Ferguson had the perfect right to dispose of it to the plaintiff, and the plaintiff acquired a good title by the transfer to him.

The order should be affirmed and judgment absolute ordered for the plaintiff on the stipulation, with costs.

All concur, except EARL, J., dissenting, RUGER, Ch. J., and ANDREWS, J., taking no part.

Order affirmed and judgment accordingly.

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THE PEOPLE, ex rel. WILLIAM H. WOODS, Appellant, v. ISAAC W. CRISSEY, as Comptroller, etc., Respondent.

The legislature may provide for the manner in which the result of an election shall be determined and declared, and where the mode is so provided, until it is obeyed, the election is not complete and the candidate not qualified to serve.

At the general election, held in November, 1881, M. & F. were candidates for the office of alderman in the city of Troy. Two of the inspectors of election made out and signed a statement certifying that F. had received a majority of the votes cast. The other two inspectors refused to sign the same. The incomplete statement was filed in the office of the city clerk, and F. took the oath of office. *Held*, that until the rights of the parties were tested in the courts and the result settled, the election was to be treated as a failure so far as either party sought to found a right upon it, and neither could claim any benefit therefrom; that the provision of the original charter of the city of Troy (§ 5, chap. 181, Laws of 1816), providing for the manner of electing aldermen, requiring inspectors of election by a written statement to certify and declare the result, and file their certificate in the office of the city clerk, has not been repealed or modified unless the general election law was applicable, and that makes the duties of inspector, in ascertaining and declaring the vote, even more specific; and that by such failure to elect, a vacancy was created. (§ 6, chap. 101, Laws of 1855.)

At the time of said election, M. was an incumbent of the office, having been elected for a term from March, 1881, to the general election of that year, under the amendment of the city charter of 1880 (§ 7, chap. 30, Laws of 1880), which changed the date of the municipal election from March to the day of the general election in November, and which provided for filling the short terms at the general election in 1880. *Held*, that as no successor to M. was "duly qualified," he held over under the provision of the city charter of 1870 (§ 6, title 6, chap. 598, Laws of 1870), declaring that "all persons elected or appointed under this act shall continue to hold their office until a successor is duly qualified"; that said provision applied to the office of alderman; that it was not inconsistent with the provisions of the amendatory act of 1880 in reference to the short term; and so it was not repealed by said act.

F., who prior to the general election in November, 1881, had not sought to act as alderman, on the night before that election, resigned and at that election fifty-five votes were cast for him for alderman "to fill vacancy." No public notice of his resignation, or of any vacancy in the office, or of an election to fill such vacancy had been given, nor had the common council directed an election to fill a vacancy. At a special meeting of the common council held a week after the election under call of the mayor, "for

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the purpose of canvassing the votes for mayor and school commissioners," D. F., city clerk, read the resignation of F. and announced the votes cast for him to fill vacancy. The president declared F. to be elected, and entitled to qualify and take his seat; the oath of office was administered and filed, and F., against the remonstrances of some of the board, acted as alderman. *Held*, that the sole effect of the resignation was upon F. as a contestant, and was an abandonment of his claim; that the only mode of filling the vacancy was by order of the common council, directing an election and determining the time and place (§ 8, chap. 131, Laws of 1816; § 2, chap. 293, Laws of 1854; § 4, chap. 101, Laws of 1855); and that, therefore, F. was not elected.

People, ex rel. Davies, v. Cowles (13 N. Y. 350), distinguished.

Immediately after the adjournment of said meeting of the common council, the new mayor, by order in writing, suspended D. F. from office, and then nominated and appointed O'B. city clerk *pro tem.*; by him the roll of new members was called; six old and seven newly-elected members answered to their names. The seven took the oath of office before O'B., who was a notary public, and filed their oaths in the office of the city clerk, and thereupon the thirteen, with M., fourteen constituting a quorum, proceeded to act as a board. K. was nominated and confirmed as city clerk. *Held*, that the meeting was lawful and lawfully constituted; that the action of the seven new aldermen, even if they did not legally take the oath of office, was valid; also that while the suspension of D. F. did not amount to a removal, the nomination or confirmation of K. had that effect; that the city clerk, having no fixed term of service, could be removed at pleasure by the proper appointment of a successor.

The common council so constituted proceeded to elect two police commissioners; it was resolved that they be elected at one time and by one ballot, each voting for but one. Eight voted for M.; six for C. By the rules of the common council, the assembly rules as laid down in *Croswell's Manual* are made controlling. *Held*, that conceding the provision of the charter of 1890, confining the vote of each alderman in the election of police commissioners to one of the two to be chosen for the same term, to be unconstitutional, it imposed no restraint and the aldermen must be deemed to have voluntarily voted as they did, and the failure to exercise their full rights did not affect the vote actually given; that as under the assembly rules, a quorum being had, a majority of all present voting for the specific office, was sufficient to elect, there being a quorum present, and the officer chosen in each case having received not only a majority of those voting to fill that office, but all of those so voting was legally elected.

The provision of said act of 1890 (§ 10), requiring that "the compensation or salary of any officer shall be fixed before his appointment," does not require the salary to be fixed before every new appointment; when once properly attached to the office it is sufficient.

The power given by said act (§ 3) to the mayor, to suspend any ap-

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pointed officer for misconduct or neglect, was simply incident to and depended upon the power of removal given to the common council, and was repealed, as to police commissioners, by the provision of the amendatory act of 1881 (§ 1, chap. 76, Laws of 1881), which gives to the Supreme Court exclusive jurisdiction and power to remove them.

The said act of 1881 is not repugnant to the constitutional provision requiring (Art. 8, § 16) a local bill to embrace but one subject, and that to be expressed in the title.

Where, therefore, a warrant for supplies was drawn by M. & C. and by H., a duly appointed commissioner, but who had been suspended by the mayor after the going into effect of the act of 1881, as three of the four police commissioners of said city, and was presented to defendant, as comptroller, to be countersigned, which was necessary before payment could be demanded, *held*, that the signers of the warrant were lawfully police commissioners; and that a peremptory *mandamus* was proper, requiring the comptroller to countersign said warrant.

(Argued February 9, 1883; decided March 16, 1883.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made December 16, 1882, which affirmed an order of Special Term denying an application on the part of the relator for a peremptory *mandamus* to compel defendant as comptroller of the city of Troy to countersign a warrant drawn by John Magill, S. A. Craig and Elisha W. Hydorn, as police commissioners of said city, in favor of relator, for supplies purchased by and furnished to the board of police commissioners.

The facts so far as material are stated in the opinion.

Benjamin H. Hall and Samuel Hand for appellants. The certificates were entire nullities as signed but by half of the inspectors in each district, and dissented from by the other half. (McCrary on Elections, § 274; *Perry v. Whitaker*, 71 N. C. 475.) The election is not complete until the result has been declared and certified by the proper inspectors. (*People, ex rel. Conliss, v. North*, 72 N. Y. 124, 128, 129; McCrary on Elections, §§ 215, 274; *Barnes v. Adams*, 2 Bartlett, 771; Laws of 1855, chap. 513, § 3.) In the absence of any return or canvass showing the result of the election, and until by that

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or some judgment of the court some one is put in a position to qualify and has done so, the former incumbent must hold over even where there is no doubt about the actual result. (*People v. North*, 72 N. Y. 124, 128, 129; 1 R. S. 117, § 9.) Repeal of a statute by implication will never be presumed. (*Bowen v. Lease*, 5 Hill, 221; *Wallace v. Bassett*, 41 Barb. 92; *Williams v. Potter*, 2 id. 311; Sedgwick on Statutory Const. 127, 128.) An election to fill a vacancy must be ordered by the common council. (*Secord v. Fautsch*, 44 Mich. 89; *Foster v. Scarff*, 15 Ohio, 532; *Reel v. Ray*, 17 Ind. 554; *People v. Potter*, 6 Cal. 26; McCrary on Elections, §§ 135, 136, 137; Laws of 1854, chap. 293, § 2; Laws of 1855, chap. 101, § 4; *People v. Peck*, 11 Wend. 64; *Ree v. Gaborian*, 11 East, 77.) The original order of suspension in May, 1881, was absolutely void for want of jurisdiction. (Laws of 1870, chap. 520; id., chap. 598, title 2, § 2; Laws of 1880, chap. 30; id., chap. 328, p. 476; Laws of 1881, chap. 76, § 6.) The term of office of the four commissioners (if any) appointed under chapter 30, Laws of '1880, was not declared by law, and was consequently during the pleasure of the common council. (Constitution, art. 10, § 3.) As the two acts cannot exist together, hence, upon well-established principle, the latter repeals the former beyond all doubt or question so far as the trial by the common council is concerned. (*People v. Brooklyn*, 69 N. Y. 605; *Dean of Ely v. Bliss*, 5 Beav. 582; *Norris v. Crocker*, 13 How. [U. S.] 429; *Mongeon v. People*, 55 N. Y. 613, 616; *People v. Van Nort*, 64 Barb. 205; *Heckmann v. Pinney*, 81 N. Y. 215; *Pratt v. Munson*, 84 id. 588.) The suspension attempted by the mayor cannot exist consistently with removal by the Supreme Court. (1 Laws of 1880, p. 119; *People v. Brooklyn*, 69 N. Y. 605; *Heckmann v. Pinney*, 81 id. 215; *Pratt v. Munson*, 84 id. 588; *Dexter P. R. Co. v. Allen*, 16 Barb. 15; *People v. Van Nort*, 64 id. 205.) There is nothing in the objection that chapter 76 of Laws of 1881 is unconstitutional on account of defect in its title. (*People v. Briggs*, 50 N. Y. 533; *In re Mayer*, id. 504; *In re Met. Gas L. Co.*, 85 id. 526, 529; *Kerrigan v.*

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Force, 68 id. 384; *People v. Banks*, 67 id. 568, 571.) The only way to question the acts of the police commissioners, on the ground of unconstitutionality of the Troy police law, is by a *quo warranto* by the attorney-general. It cannot be done by the defendant or other person collaterally. (*Mott v. Connolly*, 50 Barb. 516; *Demarest v. Wickham*, 63 N. Y. 323; *People, ex rel. Dolan, v. Lane*, 55 id. 217; *People v. White*, 4 Wend. 400; *People v. Stevens*, 5 Hill, 616; *People, ex rel. Watkins, v. Perley*, 80 N. Y. 624.) The court will never declare a law unconstitutional, unless unavoidably forced thereto by some provision of the Constitution clearly and unmistakably prohibiting or restricting the thing sought to be done. (*People v. Comstock*, 78 N. Y. 365; *In re Gilbert R. Co.*, 70 id. 371; *People v. Albertson*, 55 id. 54; *People v. Pinckney*, 32 id. 377. The authorities of a city are the aldermen thereof. (*Purdy v. People*, 4 Hill, 384, 387, 409.) There is nothing in the objection that the new police commissioners, Craig and Magill, were not such, because their oaths were not filed with the proper clerk. (*Weeks v. Ellis*, 2 Barb. 324; *Greenleaf v. Low*, 4 Denio, 160; *People v. Cook*, 4 Seld. 64, 84; *People v. McMannus*, 34 Barb. 620; *Foot v. Stiles*, 57 N. Y. 401; *Cronin v. Bundy*, 16 Hun, 520; Laws of 1880, chap. 30, § 3, p. 119; *People v. Fitzsimmons*, 68 N. Y. 514.) However defective the oath, or indeed if there was a failure to take the oath at all, nevertheless the new aldermen are vested with the office, and by the language of the statute (1 R. S. 121, § 31), the failure to take and subscribe the oath of office is only a ground of forfeiture and punishment. In such a case the officer holds until proceedings are taken by *quo warranto* to forfeit his office. (*In re Kendall*, 85 N. Y. 302; *Foot v. Stiles*, 57 id. 401; *Weeks v. Ellis*, 2 Barb. 324; *People v. Hopson*, 1 Den. 574; *Hamlin v. Dingman*, 5 Lans. 61; *Mayor v. Tucker*, 1 Daly, 107.) City clerks may take the oaths of officers embraced in section 22, chapter 5 of 1 R. S. 119. (*People v. Stowell*, 9 Abb. N. C. 456.) The method of appointing the police commissioners provided by the act of 1881 (Chap. 362), is in conformity to the Constitution,

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and the new aldermen are to be held as aldermen *de jure* as well as *de facto*, by all the world until a forfeiture is enforced by the intervention of the State. (57 N. Y. 403; 85 id. 305; Laws of 1872, chap. 2, § 25, p. 10; id., chap. 143, § 3, p. 370; Laws of 1876, chap. 30, § 3, p. 21; Laws of 1870, chap. 77, § 4, p. 77; Laws of 1867, chap. 197, § 1, p. 299; Laws of 1870, chap. 519, § 3, p. 1167; Laws of 1874, chap. 315, § 22, p. 372; Laws of 1869, chap. 194, § 2, p. 350; Laws of 1876, chap. 367, § 14, p. 346; Laws of 1877, chap. 127, § 1, p. 129; id., chap. 79, § 2, p. 83; Laws of 1866, chap. 444, § 4, p. 987; Laws of 1869, chap. 17, § 2, p. 30; Laws of 1870, chap. 519, § 3, p. 1167; Laws of 1872, chap. 2, § 3, p. 6; id., chap. 186, § 3, p. 519; Laws of 1873, chap. 335, § 4, p. 484; Laws of 1874, chap. 515, § 1, p. 704; id., chap. 542, § 1, p. 729; Laws of 1877, chap. 79, § 2, p. 83; Laws of 1879, chap. 46, § 1, p. 43; Laws of 1870, chap. 255, § 2, p. 571.)

R. A. Parmenter and Essek Cowen for respondent. The provision in section 4 of chapter 328 of the Laws of 1880, limiting and prescribing the manner of voting by the common council when electing police commissioners, is unconstitutional. (*Wentzler v. People*, 58 N. Y. 529; *People v. Pinckney*, 32 id. 382; *People v. Albertson*, 55 id. 387; *People v. Raymond*, 27 id. 428; *Menges v. City of Albany*, 56 id. 374; 69 id. 86.) The people could without any notice elect an alderman to fill the vacancy, and they did so, for by the returns signed by all the inspectors of election, Fleming received fifty-five votes to fill the vacancy occasioned by his own resignation. (*People, ex rel. Davis, v. Cowles*, 13 N. Y. 350; R. S., § 22, art. 3 of chap. 5 of part 1.) O'Brien, the newly-appointed clerk, could not administer an oath of office as notary public. (R. S., chap. 5, part 1; id., title 6 of chap. 5, § 2 of art. 1; Laws of 1880, chap. 332, § 3.) Hydorn's suspension could not be inquired into collaterally. (Dillon on Municipal Corporations, § 201.) Chapter 76, Laws of 1881, is void, because in contravention of section 16 of article 3 of the Constitution, which provides that a local bill shall contain but

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one subject, and that subject shall be expressed in its title. (*People v. Hills*, 35 N. Y. 449; *People v. Commrs. of Highways*, 53 Barb. 70; *People v. Allen*, 42 N. Y. 404.) It is not sufficient that a bill express a subject in its title, it must truthfully express the real subject. (*People v. Allen*, 42 N. Y. 404; *Gaskin v. Meek*, id. 186.)

FINCH, J. Out of the special legislation relating to the city of Troy have arisen very serious complications, which we are asked to remove by determining the legal questions involved. These respect the official right and authority of some of the persons who are acting as police commissioners of the city, and a challenge of their title to that office. Two of them, Magill and Craig, claim to have been appointed by the common council, under the provisions of chapter 328 of the Laws of 1880, which act the respondent asserts to be unconstitutional, and so raises the first question which has been argued before us. We ought not to decide it. It has a possible importance beyond the issues here involved. It touches the question of minority representation upon which has been founded very much of legislation, and about which there is room for difference and debate. It respects also the power of the legislature to put restraint upon the action of city authorities, and to guide and limit their modes of procedure. We do not at all mean to intimate or suggest a doubt; but to follow a rule long and wisely adopted by the courts, not to decide a constitutional question unless directly involved in the determination of the case presented, nor without clear and apparent necessity for so doing. In the present case its determination is not essential to the decision, nor even to the general purposes for which this litigation was instituted. Passing by the obvious suggestion that the assailed commissioners were officers *de facto*, and waiving its consideration, out of deference to the imperiled peace of a disturbed city, and the pressing need of settling the questions of official right, there is a further reason why the constitutional inquiry is not here. The ground alleged as working a violation of the fundamental law is, that

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the legislature not only designated the common council as the authority to appoint police commissioners, which was so far a lawful enactment, but proceeded to dictate to such common council the mode of making the appointment; and thus, by confining the vote of each alderman to one out of the two to be chosen for the same term, made it possible for less than a majority of the quorum to elect one of the commissioners. But, if we assume this provision to be unconstitutional, it was a nullity. We are not at liberty to say that the common council did not know it. They are presumed to have known the law, and had an official legal adviser entirely competent for their instruction. They must be held then to have voted without restraint. We cannot say that an unconstitutional law, if indeed it be such, put them under compulsion. A nullity, known to be such, cannot compel. The aldermen chose to vote, therefore, as they did vote; and the question comes down to this, as the learned counsel for the respondent very frankly concede, viz: whether, if the act of 1880 had not been in existence, and the aldermen had done exactly what they did do, the result would have been a legal election of Magill and Craig. Let us see. Two officers were to be chosen and two offices to be filled, and this the board determined to do at the same time and upon one ballot. Eight members voted on the question of electing an incumbent for one of the offices, and six on the question of filling the other. In each case the officer chosen had not only a majority of those voting to fill that office, but all of those so voting. Magill received eight votes which was a majority of the quorum, and would have been elected even if the other six had voted against him. We may thus confine our attention to Craig. He received six votes. These, however, were all the votes cast for his separate office. A quorum being had, a majority of all present and voting for the specific office was sufficient to elect. Such is the rule in the assembly, upon an election of speaker, as laid down in *Croswell's Manual*; and that authority is made controlling on the common council by its own rules. (Rule 49.) While only six voted upon the question of filling Craig's office, the board might have required

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the whole fourteen to have so voted. (Rule 24.) Not having done so, the eight who did not vote must be deemed to have been excused. The board then put their own construction upon the effect of their own voting. They declared Magill and Craig elected, and nobody dissented. Not only that, but they had done precisely the same thing before. In a full board, in November, 1880, Magill and Hydorn were each chosen by nine votes, being less than a majority of the quorum present. Both were declared elected, their title to their offices recognized, and Hydorn suspended by Mayor Murphy, and sought to be removed. Each alderman who was content to vote for one commissioner might have voted for two, and that would have raised the constitutional question. But they chose not to do so, and Magill and Craig were elected. (*The People, ex rel. Watkins, v. Perley*, 80 N. Y. 624.) The fault of the argument to the contrary is that it treats the sum of the votes cast for the two separate offices as identical with the number of those voting for each. That will not do. Fourteen did not vote to fill the office for which Craig was a candidate, but only six, and the rest were excused. For these reasons we think the constitutional question is not here for decision, and so far as that objection is concerned, the right of Magill and Craig to act as commissioners cannot be successfully assailed.

The next attack upon their title comes from a different direction. It is claimed that the common council never appointed them at all, and the facts from which this contention springs are somewhat singular and quite unusual. At the date of the appointment the common council of Troy was in fragments; and each of the pieces claimed to be itself the true board and the genuine authority, and denied regularity to its adversary. A full board consisted of twenty-six members, and it required fourteen to constitute a quorum. Such a quorum was present on the 14th day of November, 1882, when Craig was chosen police commissioner, if Morrissey, who constituted one of the quorum, and acted and was recognized by his associates, was legally an alderman and a lawful member of the board. It is asserted that he was not, and on the following state of facts.

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Morrissey was elected in March of 1879 for a regular term of two years, expiring in March of 1881. During such term, by an amendment of the city charter, the date of the usual municipal election was changed from March to November, and to the general election held in the latter month. (Laws of 1880, chap. 30.) From the close of Morrissey's term in March of 1881, to the general election in November of that year, the change thus made involved a fragment of a term for which special provision was necessary; and which was supplied by the further enactment that such short and intervening term should be filled at the general election in 1880. At that time Morrissey was again elected for the short term, and became his own successor at the close of his full term, for a further period ending with the Tuesday succeeding the second Monday in November, 1881. Just before that date, and while still an alderman, he was again a candidate for the same office, with one Fleming for his competitor. What was the real result of the struggle between the two we do not and cannot know. At the close of the election, and the completion of the count, two out of the four inspectors refused to certify that Fleming had received a majority of the votes cast, upon the ground that ballots for him had been fraudulently placed in the box by unauthorized persons, and that the statement of his vote prepared by the other inspectors was not true. It is said on one side, but denied on the other, that the apparent result was announced at the close of the canvass. On that subject the language of the affidavit which furnishes for us the facts is somewhat ambiguous. The language is that "after the result had been made known by the canvassers" the statement was prepared which two of the inspectors refused to sign. How it was "made known," or to whom, we are not told. Certainly it falls short of establishing a public proclamation of the vote by the chairman of the board, and it is quite certain that the dissenting inspectors could not have concurred in what they declared to be a falsehood. The incomplete statements, signed by half only of the inspectors, were filed in the office of the city clerk; Fleming took and filed the oath of office on the

15th of November, 1881, and at once instituted proceedings to compel the dissenting inspectors to sign the certificate of his election. That legal proceeding appears to have been abandoned, and the certificate was never signed by the inspectors who refused. At the annual meeting of the common council immediately following the election, and held on the 15th day of November, 1881, neither Morrissey nor Fleming appeared, and, during the whole of the year succeeding, the latter did not participate in any meeting of the common council; while in three meetings held in 1881, the regularity of which is questioned, Morrissey took part, but abstained from attendance in the following year down to the date of the general election.

At this point it appears needful to determine who was lawfully the alderman of the seventh ward, entitled to occupy the seat for which Morrissey and Fleming contested, during the year succeeding the election of November, 1881. We cannot say that either was elected. It is argued that one must have been. That does not follow. A canvass in which all or a majority of the inspectors concurred, or an investigation by a court of justice in which the vote actually and honestly cast was correctly counted might have resulted in a tie. While that is not probable, it is certainly possible. We cannot know. We have no legal evidence before us from which we can give the seat to either by virtue of the election. Either one, by proper pursuit of his legal remedy, might have solved the problem, but neither did so, and as the case stands, upon the facts, we must deny to both alike any benefit from an election the result of which we cannot correctly and lawfully know. It is not possible for us to avoid this conclusion. The votes are not here for us to count; the authority appointed by law has not acted, has certified nothing, and stands equally divided, and asserting contrary results, both of which cannot be true; and neither party has chosen to test his right in the courts and settle the result. For us nothing is possible, except to treat the election as a failure so far as either party seeks to found a right upon it, and deny to either any resultant benefit from that source. That being so, it follows, that Morrissey, who was the alderman when this

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undetermined action took place, continued to be such under the charter provisions which permit an officer whose term has expired to hold over, unless there is force in the argument of the respondent founded upon the language of such provision, and the peculiar character of the short or fragmentary term.

The charter provides (Laws of 1870, title 6, § 6), that "all persons elected or appointed under this act shall continue to hold their office until a successor is duly qualified, unless suspended or removed." No successor to Morrissey was duly qualified: (*People, ex rel. Conliss, v. North*, 72 N. Y. 124.) at least during the year of which we are now speaking. The case cited arose under the provisions of the charter of Cohoes, which are different from and more specific than those of the charter of Troy, but the same principle governs both cases. That is, that the legislature can provide for the manner in which the result of an election shall be determined and declared, and their enactment is binding; that the power to declare the result must be lodged somewhere, and that where the mode of so doing is commanded, until it is obeyed and such acts are done, the election is not complete and the candidate not qualified to serve. By the original charter of the city of Troy (Laws of 1816, chap. 131, § 5), the manner of electing aldermen is provided, and upon the canvass of votes, the inspectors are required, by a written statement, to certify and declare the result, and file their certificate in the office of the city clerk. That provision has not been repealed or modified, so far as we have been able to ascertain, unless the general election law applies to charter officers voted for at a general election, and that makes the duty of the inspectors even more specific. So that, in the present case, the duty of ascertaining and declaring the result was lodged with the inspectors, and the mode of their action prescribed by law. Following the doctrine of the case cited, we must hold that until the officers appointed by law to determine the question did so lawfully determine it, or the judgment of a competent court had decreed the result, Fleming was not qualified to serve, and so Morrissey, during the year in question, had no successor "duly qualified," and himself held over pursuant to the statute, unless some or all of three remaining objections are found to be valid.

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It is said the charter of 1870, permitting old officers to hold over, applies only, by its express terms, to officers elected or appointed under that act, and that the aldermen were not such. The criticism seems to us quite technical, and without any substantial merit, and if sustained, would lead to very unexpected and injurious results. The charter provides (Title 2, § 1), that "the officers of said city shall be a mayor, two aldermen for each ward, * * * all of whom shall be elected by ballot, or appointed, and shall possess the powers and discharge the duties of their respective offices, as now provided by law, except as modified by the provisions of this act." And thus the existing statutory regulations, so far as unmodified, were incorporated into and became integral and essential parts of the new enactment, by its reference to and recognition of such older provisions. The aldermen chosen after 1870 were officers of the city under and by virtue of that act, and were elected by force of its authority. It does not at all alter the case that the mode of their election and the range of their duties was fixed by a reference to earlier provisions; nor that the date of their election, and a consequent temporary modification of their terms was effected by an amendment. The old unrepealed enactments, by the express reference of the charter, and the later provisions, by amendment of the charter, became part and parcel of that instrument, and constituted elements of its completed structure.

But it is said again that the clause of the charter, allowing officers to hold over, does not relate to aldermen. Section 6, which we have partly quoted, in its complete form provides: "The official term of *all persons elected or appointed* under this act, except as otherwise herein provided, shall commence as follows, viz. : Such as are required to give security, from the time such security shall be given and approved; such as are not required to give security, on the first Monday after their appointment and confirmation; and *all persons elected or appointed* under this act shall continue to hold their office until a successor is duly qualified, unless suspended or removed." The argument addressed to us is that the phrase, "all persons elected or appointed," as used in the last clause of the section,

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means exactly what the same words signify in the first clause of the section ; that as there used they relate only to two classes of persons, viz.: those required to give security, which class does not include aldermen ; and those not required to give security, but appointed and confirmed, which class again does not include aldermen. If we conceded to the identity of language the claimed identity of meaning, the argument would still be unsound, for, in addition to the two classes of persons referred to, and in which aldermen were not embraced, there is still a third class, in which aldermen are included, and which consists of those officers, the beginning of whose terms is in the act or by its force, "otherwise provided." So that the first clause of the section does in fact cover and relate to aldermen, and probably to all charter officers, without exception. Those whose terms are fixed in their commencement by other provisions of the act ; those who are required to give security ; and those who are not, but have been appointed and confirmed, probably embrace the entire range of charter officers. The beginning of the aldermen's terms was fixed by the act of 1870, through the reference therein made to the existing provisions of law. Their terms began "when elected," and they were thus included in the first clause of the section and referred to by the phrase, "except as herein otherwise provided." (Laws of 1855, chap. 101, § 1.) But independently of this suggestion, we are convinced that the phrase, "all persons elected or appointed," in the second clause of the section, was intended to be just as broad and sweeping as its language indicates. No practical or sensible reason can be given why it should not apply to all alike, and its ordinary and obvious meaning should be adhered to. It purports to establish a uniform and useful rule, and we do not feel at liberty, by very close and doubtful criticism, to narrow or limit its operation.

But it is further contended that the provisions of the amendatory act of 1880, with reference to the short and fragmentary term of 1881, are inconsistent with the general provision under discussion, and the latter is, therefore, repealed by section 46 of the act of 1880, which in terms repeals all acts and parts of acts incon-

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sistent with or repugnant to its own provisions. The argument in favor of this proposition derives some force from the language of the act, but none from the reason or necessity of the situation. Section 7 is principally devoted to fixing the terms of the aldermen. No general or fundamental change was intended. A two years' term was sought to be preserved, and the only changes made grew out of the altered date of the election. It was thereupon provided, on the 27th of February, 1880, a few days before the regular charter election, as follows, viz.: *First*, that one alderman in each ward should be chosen at the general election in November, 1880, to hold office for two years, or to November, 1882. We may call these, for convenience, aldermen of the first class. But that left a gap in such class from March to November, 1880, which was filled by allowing the usual March election under the charter to proceed, but abridging the terms of the thirteen thus elected from two years to the fragmentary period from March, 1880, to November of that year. We may call these short term aldermen of the first class. Their term of office was thus described, viz.: "shall hold their said offices *until their successors are elected at the general election in November next, and are qualified according to the provisions of this act.*" Thus, one-half of the aldermen were so arranged as to preserve an unbroken succession of the thirteen constituting the first class. *Second.* But thirteen more were to be provided in proper order, whom we may call aldermen of the second class. These already existed as such. They had been elected in March, 1879, and could serve until March of 1881. But here came another gap resulting from the changed date of the election, extending from March, 1881, to the regular election in that year. To fill that gap it was provided that at the general election in November, 1880, one alderman from each ward should be chosen, "who shall each hold his office from the second Tuesday of March, 1881, *until the Tuesday* succeeding the second Monday in November, 1881." We may call these, short term aldermen of the second class. A correct understanding of these details enables us to appreciate fairly the argument founded upon the language

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of the statute. It is contended that the holding of the short term aldermen of the second class, of whom Morrissey was one, was absolutely and arbitrarily fixed as extending "*until*" November, 1881; that the use of the word "*until*" negatives any possible authority to hold longer, and is inconsistent with a right to hold over; that the grant of such authority to the short term aldermen of the first class, and the omission to grant it to the short term aldermen of the second class indicates the legislative intent to withhold it from the latter; and that the similar omission as to the aldermen of the first class chosen for the full two years, which seems fatal to the construction claimed, is explainable by reference to the laws of 1855, describing their term as "for two years from the time of their election and until their successors are elected." We are not satisfied that section 7 of the act of 1880 is in any respect inconsistent with section 6 of the charter. Both can stand together by a natural and reasonable construction. Section 7 has but one obvious purpose, and that is to fix terms of office. It does not purport to legislate upon the rights of the officer after the constituted term has ended. That legislation was the purpose of section 6 of the charter. The two enactments, therefore, related to different subjects and must be construed accordingly: one fixes the lawful term; the other defines a right springing when that lawful term has ended. When, therefore, section 7 dictated a full term it could and did describe it as for two years; but when it came to define a term running for only a fraction of a year it had to describe it explicitly by dates. The termini could in no other manner be accurately stated. It must run from one date until another, and the use of the word "*until*" is in the sense of "*to*," denoting the running of the term from one point of time to another. It is a forced construction to argue out of it a prohibition against holding over after the constituted term has ended. So far we find no difficulty; but the further inquiry why the language relating to the short term aldermen of the first class, and fixing the end of their term, should be "*until* their successors are elected in November next and are qualified

according to the provisions of this act," while that relating to the short term aldermen of the second class is "until the Tuesday succeeding the second Monday in November, 1881," is more difficult to answer. Both parties attempt to do so, each on their own theory of results, but both explanations are about equally unsatisfactory. On one side it is said that as aldermen of the short term for the first class became so by an abridgment of the full term they would otherwise have had, it was thought best to extend the term, as a term, to the election and qualification of successors. While we admit the fact, we do not quite see the explanation. On the other side it is said the difference of language means that one class may hold over and the other may not. But no shadow of a reason is given for such distinction. Both classes were short term aldermen. Both filled a temporary and fragmentary term. Each sprang from the same necessity, and was of the same length, and no possible reason has been or can be given why one class should hold over and the other not. And then, there is the same omission as to the aldermen of the first class chosen for a full term. It is not denied that they could hold over, but if so it must be by force of section 6 as operative and unrepealed; for that section in the charter of 1870 took the place of and became a substitute for the provision cited from the law of 1855. That enabled an alderman to hold over only until a successor was "elected." Section 6 enables him to hold over until "a successor is duly qualified." That section covers the whole subject, and became the substituted rule, and if repealed by the same omission, as in the case of short term aldermen of the second class, the aldermen for a full term cannot hold over. The inconsistency alleged would reach both the substitute and its original. But we need not pursue the inquiry. A repeal by implication because of inconsistency or repugnancy should never be declared where a reasonable construction will harmonize statutes alleged to be conflicting. That is easily done here. Both may stand together, upon the ground already indicated, that they relate to different subjects, and so do not come in collision: that one fixes constituted terms and purports to

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do nothing more; while the other establishes rights outside of such terms and after they are ended. We are unable to say, therefore, that section 6 of the charter is repealed as to the short term aldermen of the second class.

But at the election in 1881 Morrissey's title, thus far sustained, received another blow. Fleming, who had abandoned his legal proceedings to ascertain and declare the result of the election, and during the whole year had taken no seat in the common council, nor even sought to act as alderman, resigned, the night before the election. On the next day, fifty-five votes were cast for Thomas Fleming for alderman of the seventh ward "to fill vacancy." No public notice of his resignation, or of any vacancy in the office, or of an election to fill any such vacancy, was given; nor did the common council of said city direct any election to be held to fill such vacancy. This occurred on the 7th of November, 1882. One week later, a special meeting of the common council was held under the call of the mayor, "for the purpose of canvassing the votes cast for mayor and school commissioners." At this meeting De Freest, who was then city clerk, read the resignation of Fleming, and announced the casting of fifty-five votes for him to fill vacancy: the president of the common council declared that, having been so elected, he was entitled to qualify and take his seat; the oath of office was administered and filed with the city clerk; and Fleming acted as an alderman, "against the protest of some of the aldermen;" and then the old board adjourned *sine die*, that being its last meeting. Immediately after its adjournment, the new mayor, upon an affidavit charging De Freest with misconduct, by an order in writing, suspended him from office; then nominated and appointed John H. O'Brien city clerk *pro tem.*; by him the roll of new members was called and thirteen answered to their names, of whom six were old members, and seven newly elected; the seven took the oath of office before O'Brien as notary public, which he in fact was, and filed their oaths in the office of the city clerk; Morrissey appeared and took his seat as alderman of the seventh ward, his associates consenting, and with him fourteen being

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present; and thereupon Magill and Craig were elected police commissioners for a term of four years. The mayor at the same meeting nominated Edwin A. King for city clerk, and by vote of the fourteen it was declared confirmed. Did these events destroy or affect Morrissey's right to act as alderman under the statute permitting him to hold over? Fleming declared that he resigned his office. He held none which he could resign. He stood simply in the attitude of a claimant without a certificate and who could not qualify. The sole effect of his resignation was upon himself as a contestant. He resigned and abandoned his claim, and the night before the election, Morrissey, already alderman by holding over, found the contest of the election formally abandoned, and his right to his seat freed from a hostile title. Whatever else Fleming might do, he could no longer contest Morrissey's title by setting up his own. But he went upon the ground of a vacancy. There was one by reason of the failure to elect, but not by reason of Fleming's resignation. Although it has been held in special instances that the term "vacancy" relates only to cases where officers have been duly elected, and not to those where there has been a failure to elect (*People, ex rel. Simpson, v. Van Horne*, 18 Wend. 518; *Hayden v. Bucklin*, 9 Paige, 512), yet that construction cannot apply here, since the legislation respecting the election of aldermen of Troy specifically defines a failure to elect as one cause of a vacancy. (Laws of 1855, chap. 101, § 6.) But if for that reason we must hold that a vacancy in a legal sense existed, still the only mode of filling it was by an order of the common council directing an election to be held to fill it, and determining the time and place. (Laws of 1816, chap. 131, § 5; Laws of 1854, chap. 293, § 2; Laws of 1855, chap. 101, § 4.) Such election is a special one to fill out a remnant of a constituted term, and cannot be held except by order of the common council.

There can be no election without some valid authority behind it. A few voters putting tickets in a box does not alone make an election. Here, no order of the common council was made, and there was no election to fill a vacancy. All that there was

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appears to have been a stratagem and artifice. The voters knew nothing of it. They made no choice. Fifty-five persons tried to appoint Fleming alderman. He was not elected, for that implies opportunity to reject or choose another, and such was not given. It is a misnomer to call such a proceeding an election. It was a nullity. (*Rees v. Gaborian*, 11 East, 77; *Foster v. Scarff*, 15 Ohio, 532; *Secord v. Foutch*, 44 Mich. 89; *Beal v. Ray*, 17 Ind. 554; *People, ex rel. Smith, v. Peck*, 11 Wend. 604.) The case of *People, ex rel. Davies, v. Cowles* (3 Kern. 350) decides no contrary doctrine. There an authority stood behind the election and commanded it, and no less an authority than the Constitution itself. And there, too, the existence of the vacancy was publicly known, conventions made their nominations, and fifty thousand votes were cast. There was no trace of artifice or fraud, and no defect except the formal one of no notice by the secretary of State, which, in that instance, it was impossible to give according to law. The case here is entirely different; and we do not think it right to recognize as an election and as the foundation of an official title such a proceeding as the one before us; what is called an election was not such, and can have no possible effect upon the rights of the parties; and what occurred at the last meeting of the old board is immaterial, since nobody is here claiming or denied any right through a vote cast by Fleming on that occasion.

The meeting, therefore, of the quorum of fourteen on the occasion of the appointment of Magill and Craig as police commissioners was a lawful meeting and lawfully constituted; for there is no merit in the remaining objection that the seven newly-elected members did not lawfully take the oath of office, since O'Brien was not legally city clerk and could not administer that particular oath as notary public. The action of these seven aldermen in voting for police commissioners would have been valid if they had taken no oath. (*In re Kendall*, 85 N. Y. 305; *Foot v. Stiles*, 57 id. 401; *Weeks v. Ellis*, 2 Barb. 320.) These cases decide that the officer elected and who by the certificate of the proper authority to that effect, is or has become duly qualified to hold the office, is the rightful officer

although holding by a defeasible title when he does not take the oath of office. That omission may work a forfeiture, but unless and until such forfeiture is adjudged, he remains the rightful officer as if he had taken the proper oath. There is no room, therefore, for the suggestion that the predecessors of the seven newly-elected aldermen held over because of the irregular oath. That there were such predecessors is argued out for us from the fact that twenty-five members met on the 11th of November, 1880; but granting that, we still do not know that the seven newly-elected members were not the same identical persons who were their predecessors. Each may have been re-elected and his own successor, so that the seven newly-elected may have been the very same persons who are claimed to have been aldermen by holding over. But if somewhere in the facts there is proof, which we have not discovered, which surmounts the difficulty, the fact remains, that the new officers were "duly qualified" without having taken the oath, and so became the lawful aldermen, until forfeiture, and their predecessors could not hold over. The double sense which belongs to the word "qualified," meaning in the statute the condition or *status* of the officer, while also often used to describe his act of taking an oath, must not be allowed to mislead or confuse us. The oaths taken by the aldermen were filed with King as city clerk, and it is claimed that DeFreest remained such. We think not. The mayor first suspended De Freest. That did not vacate his office, nor amount to a removal. The Charter invariably distinguishes between a suspension and removal. The former does not take away the office, but stops for the time being the right to perform its duties. But the city clerk, having no fixed term of service, could be removed at pleasure by the proper appointment of a successor. (*The People, ex rel. Whiting, v. Carrigue*, 2 Hill, 98, and per BRONSON, J., 104.) When King was nominated and confirmed that terminated DeFreest's office as city clerk, and King became the lawful officer, so that the oaths of office of the aldermen and of the commissioners were properly filed with him. The question raised, that O'Brien and King could not be appointed until after

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their salaries were fixed by a two-thirds vote, is answered by the fact that we do not know that they were not already fixed when the appointments were made. The office of city clerk existed under the charter of 1870, and the salary of that office may have been and probably was fixed long before the act of 1880, because the provision in the latter act that "the compensation or salary of any officer shall be fixed before his appointment" (§ 10) was not new, but existed in similar terms in the charter of 1870. (Title 3, § 5.) We must assume that it was obeyed, and that the salary of the city clerk was fixed even before 1880. We cannot even say that it was not so fixed by a two-thirds vote and at a sum less than \$600. Section 43 of the latter act does not mean that a salary once properly attached to an office by a two-thirds vote and within the prescribed limits needs to be again fixed before every new appointment. It is of no consequence, therefore, that the affidavit tells us that the salary of the city clerk has not been fixed since 1880. We have thus gone through the principal objections taken to the title of Magill and Craig. We think they were lawfully appointed and rightfully hold their office.

It remains to consider the case of Hydorn, whose title is assailed by reason of the order suspending him, made by Mayor Murphy. While Hanpon, Magill, Cavanaugh and Hydorn were organized and acting as a board of police commissioners, and on the 28th day of May, 1881, the mayor of Troy, upon affidavits charging official misconduct, made an order suspending Hydorn from office. This was done under the authority supposed to be conferred on the mayor by section 3 of chapter 30 of the Laws of 1880. That section provides that the mayor shall "have power to suspend any officer appointed or confirmed under the provisions of this act for misconduct in office or neglect of duty, to be specified in the order of suspension, and he shall, within ten days, convene the common council, of which he shall be the presiding officer, and the said common council, so constituted, shall have power to hear and determine said charges, and if found to be true, to remove the said officer from his office by a vote of two-thirds of the said common council so constituted; but no such removal

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shall be made without reasonable notice to the officer complained of and an opportunity to be heard in his defense." But in 1881, and before the suspension of Hydorn, an act was passed (Chap. 76, § 1) which provided for the removal of a police commissioner by the Supreme Court on written charges duly verified and made by any citizen of Troy, and providing for notice to and a trial of the accused officer, and enacting that "the Supreme Court of this State shall have sole and exclusive jurisdiction and power to *remove* such police commissioners from office." The mayor, having issued his order of suspension, convened the common council under the act of 1880 to hear and determine his charges. Twenty-three aldermen appeared, and Hydorn answered specially, protesting against the jurisdiction of the common council to try him. That body determining to proceed, Hydorn procured from the Supreme Court and served an alternative writ of prohibition forbidding, until further order, the common council from proceeding to hear and determine said charges. That case is still pending and has not been argued. So that from May, 1881, down to November of 1882, or for about a year and a half, Hydorn remained under the order of suspension and without trial. In November of 1882 the new mayor made an order, reciting the facts, in which he revoked, withdrew, and canceled the former order suspending Hydorn. If the mayor had power thus to revoke the order of his predecessor, so far as it suspended Hydorn, we might escape any discussion of the much graver and more serious question whether the act of 1881, giving to the Supreme Court exclusive jurisdiction for the removal of police commissioners, necessarily repealed, by implication, the mayor's authority to suspend them. But the importance of the question to the government of the city and the safe movement of its municipal machinery seems to demand of us a determination, not wholly founded upon the mayor's revocation. It is clear that, so far as the removal of a police commissioner is concerned, the power of the common council is gone. Not only does the act of 1881 cover the same subject as that of 1880, and dictate a mode of trial and removal entirely different and by another tribunal,

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but the statute expressly confers upon such new tribunal exclusive jurisdiction over the removal of the police commissioners. The language and the intention are equally plain, and must be held to deprive the common council of any authority to try and remove the accused commissioner. The two systems as a whole cannot stand together, and it remains to consider whether the power of suspension survived the change. That power was given, not as a distinct and separate authority, but as an incident and aid to the common council's power of removal. It could be exercised in no other way and for no other purpose. It limited the mayor's authority to a period of ten days, after which jurisdiction passed to the common council. If within the ten days he did not convene the board as a trial court the suspension probably ended at their close. His order was required to contain the charges against the accused, and was operative only on that condition. It seems, therefore, that in the scheme of the statute, the order of suspension is an essential and necessary part of the mode of removal, and so interwoven with, and dependent upon it that it cannot stand alone. The two modes of removal in their completeness cannot exist together. The question now is, whether any remnant of the wreck of the one can stand with the complete system of the other. The effort appears to us vain, and leading to inconsistencies and absurdities. If the mayor can suspend, he must convene the common council for a trial, but when convened it cannot try, and is without jurisdiction, and if the suspension does not instantly end, the officer is suspended indefinitely, and what was intended as a temporary suspension for ten days becomes practically a removal. And thus what was meant to be temporary becomes permanent; the process framed to begin a proceeding is turned into final judgment and execution; an incidental authority becomes a lasting and arbitrary power; suspension is transformed into practical removal; and that without power in the officer to defend against the charges and so end the suspension by acquittal. For both reasons section 30 of the act of 1880 relating to suspension and removal must be deemed repealed. The later statute

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covers the ground of the earlier and is intended to furnish the whole law; and is inconsistent with and repugnant to the earlier provisions.

The objections to the title of the act of 1881 are sufficiently answered by reference to recent decisions of this court. (*People, ex rel. City of Rochester, v. Briggs*, 50 N. Y. 553; *Kerrigan v. Force*, 68 id. 384; *In re Met. Gas Co.*, 85 id. 526.)

It follows from these views that Magill, Craig and Hydorn were lawfully police commissioners of the city of Troy when the warrant was drawn, and the comptroller should countersign the same.

The orders of the Special Term and of the General Term should be reversed, with costs, and a peremptory *mandamus* issue, requiring the comptroller to countersign the warrant drawn in favor of the relator.

All concur, except RUGER, Ch. J., and MILLER, J., dissenting, RAPALLO, J., concurring in result.

Ordered accordingly.

MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

EDWARD H. COLE, Appellant, *v.* KNICKERBOCKER LIFE INSURANCE COMPANY et al., Respondents.

(Submitted June 19, 1882; decided January 16, 1883.)

REPORTED below, 23 Hun, 255.

John L. Hill for appellant.

Henry W. Johnson for respondents.

Appeal dismissed by consent.

JULIUS H. HOMER, Respondent, *v.* CHARLES EVERETT et al.,
Appellants.

(Argued June 28, 1882; decided January 16, 1883.)

THE plaintiff, a machinist, was employed by defendants to repair a steam engine on the defendants' premises. The engine was in the sub-cellar, and in the floor, alongside the foundation of the engine, was a well-hole or excavation,

about two feet square, filled with hot water, of which danger the plaintiff testifies he had no notice. In passing from one part of the engine to another to make the necessary examination, the plaintiff stepped into this hole, and his leg was severely scalded and injured. This action was brought to recover compensation for such injuries, on the allegation that they were caused by the negligent omission of the defendants to have said hole or tank properly covered or secured.

The questions of negligence on the part of the defendants, and of contributory negligence on the part of the plaintiff, were submitted by the court to the jury, and they rendered a verdict in favor of the plaintiff. The defendants claim that these questions should not have been submitted, but that their motion for a nonsuit should have been granted. The court here say: "We have examined the testimony and think there was sufficient evidence to require the submission of the case to the jury on both of these points."

After a discussion of the evidence, the balance of the opinion is as follows:

"The court, in its charge to the jury, instructed them, among other things, that the defendants had a right to construct the well-hole in the manner they did, and to maintain it without any cover, and to utilize it as intended; yet that the existence of such a well-hole being somewhat unusual in an engine-room, and it also being unusual that the engine should exhaust into this hole, the moment they called the plaintiff into the room, it became their duty either to effectually cover the well-hole, or else to call the attention of the plaintiff to its existence, and give him proper warning concerning it, and he submitted to the jury whether they had given such warning. The only exceptions taken to the charge were "to that part of the charge which states that all the evidence shows that it was unusual for such a well-hole or receptacle to be where this one was," and to that part of the charge which states that "it was the duty of the defendants to have a cover over such receptacle."

The first exception is untenable, for all the evidence on the subject was one way, and as stated by the learned judge. The

second exception is also unavailing, for the judge made no such charge as is stated in the exception. But if, by a liberal construction of the exception, it be held to refer to what was in fact said by the judge, viz. : that, on inviting the plaintiff to enter the engine-room, it was the duty of the defendants either to cover the well-hole, or give the plaintiff proper warning concerning it, we cannot hold the instruction to be erroneous.

The only remaining exceptions in the case relate to rulings of the court at the trial, permitting the plaintiff to give evidence of certain declarations of one Kennedy, who was a witness on the part of the defense.

The plaintiff was permitted to prove that Kennedy made statements to the plaintiff, to the plaintiff's attorney, and to the plaintiff's father, to the effect that the hole into which the plaintiff had stepped had been there a long time before the accident; that if Mr. Everett had warned the plaintiff the accident would not have happened; that it was a matter of frequent comment among the help in the hotel that it was a dangerous place, and that he, Kennedy, had called Mr. Everett's attention to it as a dangerous place. These declarations of Kennedy were, of course, hearsay, and clearly incompetent, unless they were contradictory of, or inconsistent with, something which Kennedy had previously testified to as a witness for the defendants, and which was material to the issue, in which case they could be proved for the purpose of discrediting the testimony which Kennedy had previously given.

The substance of the testimony which Kennedy had given on his direct examination was that he was at the time of the injury to the plaintiff steward of the defendants' hotel; that he recollected the accident, and just previous to it saw the plaintiff, in company with Mr. Charles Everett, one of the defendants, pass into the sub-cellar, where the accident occurred; that it was very light for a sub-cellar, having two windows, and two gas-jets burning at the same time; and that there was no steam there before the plaintiff went in with Mr. Everett. That as they passed witness and went down the steps into the sub-cellar, witness heard Mr. Everett say to plaintiff: "Homer, look out for that hole or you will get wet." That seven or eight minutes afterward witness heard the crackling noise from the

force of the steam through the pipes, and then knew the steam was on, and about half an hour afterward the accident occurred. Witness went near to plaintiff and heard him exclaim what a damned fool he was to step into that hole. Witness further testified that he had never known of any warm water being in the receptacle before the day of the occurrence, and that it (referring to the hole) was, as he judged, placed there because the sub-cellar was on such low ground to receive the water that got into it from the tide. That during the eleven years he had been in defendants' employment he had never known of any warm water being received into the receptacle.

On cross-examination the witness was asked whether he had ever told any one that they had a great deal of hot water in that hole before—whether he had ever said that he himself had warned Mr. Everett that it was a bad trap there, and unless he guarded it some one would fall in; whether he had not said to plaintiff that he (witness) had frequently told Mr. Everett, before the day of the accident, that it was a bad trap and ought to be covered up; whether he had not said that it was a matter talked about among the servants in the house; whether he had not said to plaintiff that if Mr. Everett had cautioned him when he went down there he would not have fallen in. All these questions were answered in the negative. Similar questions were put and answered as to declarations made to plaintiff's father and to plaintiff's attorney.

In so far as the declarations sought to be proved conflicted with material testimony of the witness on his direct examination, they were clearly competent, and the witness having denied making them they could be proved by other witnesses. Some of them were plainly admissible under the rule before stated. The main points which the testimony of the witness tended to prove, on the part of the defense, were, that the cellar was well lighted; that there had never been hot water in the hole before the plaintiff turned on steam on the day of the accident, and that when plaintiff was entering the cellar Mr. Everett cautioned him to look out for the hole; and the general tendency of the testimony of witness was to show the absence of danger in entering the cellar. The declaration of the witness that "if Mr. Everett had cautioned plaintiff the accident would not have

happened," was clearly inconsistent with his testimony that such caution had in fact been given; the declarations of the witness to the effect that it was a dangerous place, and that he had called Mr. Everett's attention to it as such were not so clearly within the rule, for the witness had not testified directly that he did not consider it dangerous, nor would his opinion in that respect have been admissible; but his representation of the condition of the cellar, and that there never had been hot water there before, tended to establish an absence of danger, and was in conflict, in some particulars, with the testimony of the plaintiff. The further evidence of declarations of Kennedy as to comments among the help in the hotel respecting danger of the place were clearly not admissible, the fact of such comments being entirely immaterial, and the mere denial by Kennedy on his cross-examination that he had said that such comments had been made, could not render the fact material, or justify the raising of an issue as to the truth of his denial. (*Carpenter v. Ward*, 30 N. Y. 243.) But no specific point was made upon the trial in respect to this particular question, and only the same general objection was interposed which had been made to the whole line of examination, and we are inclined to the opinion that if there was a distinction to be made between this and the other questions it should have been pointed out at the time.

But there is a further ground upon which we think the court was justified in admitting all the evidence objected to. Upon the cross-examination of Kennedy he stated that the plaintiff requested him to go to the house of his attorney, and told him he would get a very good stake from plaintiff and his attorney by giving testimony that would go in his favor; that he went accordingly and was questioned by the attorney and told him the truth about the matter. Kennedy was afterward recalled by the defendants and testified that after he had left the employment of the defendants the Homers came after him and the subject of this stake was pressed upon him three times, and they told him what evidence they wanted, and that it was to say that this trap was always in danger, and that the kitchen help, going up and down for the vegetables, were always in danger of falling and meeting with an accident, and if he

would swear to that he would get a stake. That the attorney made this proposition once and the plaintiff at other times. On further cross-examination he varied this statement by saying that what they wanted him to testify to was that the trap was dangerous; that the kitchen help went up and down several times and made complaints to him, and that he had cautioned Mr. Everett to put a cover on, etc. On further direct examination he testified that he never complained of its being dangerous, and that there was nothing more than cold water there.

Aside from the other questions discussed, we think that the issue of an attempt by the plaintiff to suborn the witness, having been gone into on both sides, the court could not well have refused to allow the plaintiff to prove what was said in the conversations at which the attempt to suborn was alleged to have been made, and to show that the very matters, which the witness charged plaintiff with trying to suborn him to testify to falsely, were what the witness had himself voluntarily stated to plaintiff and his attorney as the actual facts of the case.

These statements are the declarations whose admission was excepted to,

The judgment should be affirmed."

William A. Beach for appellants.

Charles P. Miller for respondent.

RAPALLO, J., reads for affirmance.

All concur.

Judgment affirmed.

WILLIAM C. RUGER et al., Respondents, v. JAMES J. BELDEN
et al., Appellants.

(Submitted December 12, 1882; decided January 16, 1883.)

Martin A. Knapp for appellants.

Louis Marshall for respondents.

Agree to affirm. No opinion.

All concur.

Order affirmed.

IN the Matter of the ATTORNEY-GENERAL v. THE CONTINENTAL
LIFE INSURANCE COMPANY.

(Argued December 12, 1882 ; decided January 23, 1883.)

THIS was an appeal by certain policy-holders of defendant from an order of General Term, which affirmed an order of Special Term denying a motion on their part for a revaluation of their policies.

The opinion, which is given nearly in full, states the facts so far as material.

"Prior to 1875, the appellants had severally insured with the defendant under policies, the premiums upon which were payable two-thirds in cash and one-third in interest-bearing notes. In the years of 1875 and 1876, in consideration of a reduction of about one-third in the amount of the annual premiums to be paid and of other advantages, the appellants surrendered to the defendant their old policies and took in exchange therefor new policies of the same amounts at the reduced premiums. At the time of such exchange they severally executed to the defendant a release of it from all claims on account of the old policies, and covenanted to hold it harmless against all such claims.

Afterward the company became insolvent, and a receiver of its assets was appointed in October, 1876, and the question now to be determined is, whether the appellants are to be allowed the value of the old or of the new policies. The court below has determined that they are entitled to have allowed to them, as claims against the assets in the hands of the receiver, the values of the new policies, and that we think is right.

For considerations satisfactory to them, the appellants surrendered their old policies and took new ones upon different terms. Which policies, if they had been carried to maturity, would have been the most advantageous to the appellants, we are unable, from any data furnished in the record, to determine. They made the exchange upon the supposition and expectation that the new policies would be carried to maturity, and preferred them to the old ones, as otherwise they would not have made the exchange. They expressly released the company from all liability on account of the old policies. It does not appear and it is not alleged that the exchanges and the releases were procured by fraud or mistake. After the new policies were issued, the appellants had no further right or claim under the old policies, and whatever claim they have, they must base upon the new policies.

The certificate which was attached to each of the new policies, stating that the new policy was issued in lieu of the old policy, does not affect the question we have to determine. It did not keep the old policy in life or give any rights thereunder.

There are no data in the record to sustain the claim made by the appellants that the values of the new policies were not properly computed."

Julius McAdam for appellants.

John C. Keeler for the attorney-general, respondent.

George W. Wingate for the receiver, respondent.

EARL, J., reads for affirmance.

All concur.

Order affirmed.

THOMAS D. WIBERLY, Appellant, v. JAMES BRANDER MATTHEWS, Respondent.

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It is no objection to an award of an arbitrator that he did not hear the par-

ties or take their evidence, when it appears that they waived a hearing, and that it was intended that the arbitrator should decide the matter submitted upon his personal knowledge and inspection. An award, if valid, is a bar to an action on the original claim.

(Argued December 13, 1882; decided January 23, 1883.)

THE material facts and the views of the court thereon appear in the following extract from the opinion:

"In October, 1876, one Thomas Drummond made a contract with the defendant to erect for him a certain building in the city of New York, and he thereafter entered upon the execution of his contract and erected the building. He performed certain extra work upon the building, for which he claimed payment of the defendant. And the defendant claimed that he had omitted to perform some work which was required of him by his contract, and claimed to be allowed damages on account of such omission. And thus there was a dispute between them. For the purpose of settling this dispute they entered into a written agreement submitting the matters as to the extra work, and the omitted work to one Emile Gruivé as sole arbitrator, whose decision was to be final.

Gruivé was the architect who had drawn the plans and specifications for the building and had had supervision of the work thereon.

He subsequently made his award, by which he found the value of the extra work, \$2,265.25, and the damages for the omitted work, \$1,362.20, and he awards to Drummond the difference, \$893.05, which sum the defendant tendered and offered to pay to Drummond, but he, Drummond, refused to accept that sum, and then assigned his claim against the defendant for the extra work to the plaintiff, who commenced this action to recover for such work. The defendant set up the award as a bar to the recovery.

Upon the trial, the dispute about the extra work and the omitted work, and the submission, award and offer by the defendant to perform the award were proved and found by the referee. The plaintiff attempted to assail the award on the ground that the arbitrator did not hear the parties and take

their evidence. But the referee found upon sufficient evidence that the parties waived any hearing before the arbitrator. Gruivé was the architect having charge of the construction of the building and was familiar with all the matters submitted. The conclusion is clearly warranted by the evidence that the parties expected and intended that the arbitrator should decide the matters submitted to him upon his personal knowledge and inspection, without any evidence of witnesses, and any further or other hearing of the parties than he gave them. Drummond, having waived a hearing before the arbitrator, and the introduction of evidence, could not, after the award, complain that he was not heard. (*Day v. Hammond*, 57 N. Y. 479; 15 Am. Rep. 522.)

The claim of Drummond was merged in the award, and the award being valid was a bar to the maintenance of this action. (*Coleman v. Wade*, 6 N. Y. 44.)"

J. Wray Cleveland for appellant.

William D. Hennen for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

HENRY C. HARPENDING, Appellant, v. EDGAR MUNSON et al.,
Respondents.

It seems that where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors.

It seems, also, that a director of a railroad corporation may properly own its bonds secured by mortgage executed by it, and may enforce payment in case of default by foreclosure.

It seems, also, that where a director so owning bonds of the company becomes the purchaser on foreclosure, an action cannot be maintained to impress

a trust upon the property for the benefit of stockholders, because of fraudulent conduct on the part of the director in procuring the default which caused the foreclosure, at least without paying or offering to pay to him the amount of the bonds. The equity of the stockholders, if any, is only in the surplus after payment of the bonded debt, and the action would be in effect a bill to redeem.

(Argued December 13, 1882; decided January 23, 1883.)

THIS action was brought by plaintiff, as a stockholder of the Sodus Bay and Corning Railroad Company, to redeem, as such, from a foreclosure and sale of the road, the same having been bid off by defendant Munson. Plaintiff also asked to restrain a proposed sale of the road by the purchaser. The material points discussed, with the facts pertinent thereto, appear in the following extract from the opinion.

"The action was brought upon the theory that the foreclosure was valid, and a good title passed to Munson; but that, in such good title, the plaintiff, as a redeeming stockholder, was entitled to share. When we decided that the statute allowing such redemption was repealed (*Pratt v. Munson*, 84 N. Y. 582), the whole cause of action was gone.

It is now sought to save it by treating it as something which it was not, and by a total change of the theory on which it was brought. That can rarely be permitted. (*Salisbury v. Howe*, 87 N. Y. 128.) Usually it operates as a deception, both upon the adversary and the court, and amounts to a trial under cover of an issue not openly avowed. Frankness and fairness required that we should always meet such a change of position with distrust.

But in any event the change is impossible. The action cannot be maintained, to set aside the judgment of foreclosure and the consequent sale as fraudulent and collusive. There are no such allegations in the complaint. On the contrary the validity of the mortgage is conceded; the due issue of bonds under it; their honest ownership by the holders; a default in the payment of interest; a regular foreclosure by the trustee; a regular sale, the allegation being that the referee 'duly sold said mortgaged property described in said judgment to Edgar Munson * * in all respects as directed by said judgment,'

the delivery of a deed to the purchaser, and confirmation of the report of sale. What is said in the complaint is entirely consistent with the validity of both judgment and sale. It is asserted that Munson's motives and purposes were bad and the mortgage trustee knew it. But that did not alter the fact of a default. It was out of the fact that the duty of foreclosure sprang. The trustee was not responsible for and had nothing to do with the motives of the debtor company in not paying its interest. There is no claim against him of collusion or fraud, nor even an allegation that Munson did not bid in the property for all it was worth. And the very relief asked affirms the sale, for it prays that plaintiff may be adjudged the owner of a proportionate part of the title which passed. Then, too, the corporation, which was the mortgagor, and the defendant in the foreclosure, is not a party to the action, and has not been heard, and cannot be adjudged guilty of fraud through its director, and the judgment to which it was a party be set aside, in its absence. Nor does it help to say, that the company, if a necessary party, might have been brought in. On the face of the complaint it was not a necessary party. That appeared to be and was an action by a stockholder to redeem and went upon the ground of the validity of the sale. To such relief and such cause of action the presence of the company was not essential, and nobody suspected or was bound to suspect that the cause of action pleaded was to be dropped, and one utterly inconsistent with it put in its place. But even then, with the company brought in, the sale could not have been attacked in the face of the complaint affirming its validity. It is claimed now that Munson could not be a purchaser because he was a director, and his trust duties in that respect were inconsistent with his interests as an individual. But an officer of a railroad corporation may honestly own its bonds secured by a mortgage. We have so held. (*Duncomb v. N. Y., Hous. & North. R. R. Co.*, 84 N. Y. 190. S. C., 88 id. 1.) If that be true, he can of course enforce them in the usual and ordinary way, and if there be question as to his right to become the purchaser, that question cannot come up here, for the complaint expressly admitted his right, and alleged that the title on his

purchase was *duly* made to him. So far, therefore, as this action is concerned the foreclosure and sale must stand and be deemed valid.

It follows that the action cannot be sustained to restrain the sale to Magee, or the Syracuse, Corning and Geneva Railroad Company, his assignee. The foreclosure sale being valid, Munson became the owner of the property purchased, and could sell it as he pleased. Even if by reason of fraudulent conduct on his part, for which the allegations seem sufficient, he was liable to an action at law for damages sustained, or some sort of a trust for the stockholders could be impressed upon the property in his hands, which theory would have its own difficulties, as we shall presently see, still the Syracuse, Geneva and Corning Company had a perfect right to buy of Magee, and he of Munson. They were under no obligation to refrain. Their purchase is not charged to have been fraudulent, or the price paid unfair, and we cannot set aside their contract upon any ground which the complaint sets up as to them, for none such is pleaded.

But the most hopeful view of the case for the appellant is that which treats the action as brought to impress a trust upon the property in the hands of Munson for the benefit of stockholders, upon the ground that, as to them, he was a wrong-doer. Practically this means that he should be adjudged to hold the legal title which he had acquired for the benefit of the original company and its stockholders, because of his fraudulent conduct in procuring the default which culminated in the foreclosure. Practically this would be equivalent to setting aside the sale. But a further trouble with this view of the case is that he who seeks equity must do equity. If Munson is to be treated as trustee his lien upon the legal title for his debt cannot be disregarded. The bonds he held were honestly issued, and represent an honest debt, which the company or the stockholders are bound to pay before they take from him the property he has bought. If he is not the absolute owner, he at least is such to the extent of his debt, and can defend his possession in equity until it is paid. Granting that we may wipe out all that has been done, we cannot wipe out his debt or his lien. The stockholders, therefore, can only impress a trust upon his legal title, and so re-claim the property for their benefit by first pay-

ing and discharging Munson's debt; and such an offer is essential to their right of action. The suit becomes a bill to redeem. (Sto. Eq. Pl., § 187, a.) But none such is pleaded or proved. The one pleaded is only of \$171, and there is no offer of anything else. The equity of the stockholders, if they have any, is only upon the surplus of the property remaining after payment of the bonded debt. If there is no such surplus then they have lost nothing. If there is such surplus, or one may be realized, their equity must be confined to that, and they must pay the bonded debt, if they ask a court of equity to return them the property with the bonds and the mortgage extinguished by a foreclosure. And, in this view of the case, it is evident that the corporate mortgagor, representing the whole body of stockholders, and not a single one of the latter, is the proper party to assail as voidable in equity the legal title which has become vested in Munson. (*Olcott v. Tioga R. R. Co.*, 27 N. Y. 546.) No reason is shown why it would not or might not have brought the action."

Charles S. Baker for appellant.

B. W. Huntington for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

AUGUSTA BARTHOLOME et al., Executors, etc., Respondents, v.
SIGISMUND KAUFMANN, Appellant.

(Argued December 15, 1882; decided January 23, 1883.)

DECIDED on the facts.

Lewis Sanders for appellant.

Benjamin Merritt for respondents.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

In the Matter of the Application of the ATTORNEY-GENERAL
OF THE STATE OF NEW YORK v. THE GUARDIAN MUTUAL
LIFE INSURANCE COMPANY.

(Argued January 16, 1888; decided January 28, 1888.)

William B. Hornblower for appellant.

Rufus W. Peckham for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

THE PEOPLE, ex rel. EDWARD CAVANAGH, Appellant, v. DAVID
McADAM, as Justice, etc., Respondent.

(Submitted January 16, 1888; decided January 28, 1888.)

REPORTED below (28 Hun, 284).

Roscoe H. Channing for appellant.

Henry Wehle for respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

CHARLES J. QUINBY, Appellant, v. HORACE B. CLAFLIN et al.,
Respondents.

(Argued January 16, 1883; decided January 23, 1883.)

MEM. of decision below (27 Hun, 611).

I. T. Williams for appellant.

Robert S. Green for respondents.

Agree to dismiss appeal. No opinion.
All concur, except RAPALLO, J., absent.
Appeal dismissed.

JOHN SHEILDS, Appellant, v. ANNA A. INGRAM, Respondent.

(Argued January 23, 1883; decided January 30, 1883.)

Moody B. Smith for appellant.

Willam A. Courseen for respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

LUTHER T. FOX, as Trustee, etc., Respondent, v. HENRY SMITH,
as Executor, etc., et al., Appellants.

(Argued January 18, 1883; decided February 6, 1883.)

Nathaniel C. Moak for appellants.

Hobart Krum for respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

DENNIS MAHONEY, as Administrator, etc., Respondent, v. THE
CITY OF BUFFALO, Appellant.

(Submitted January 23, 1888; decided February 6, 1888.)

E. C. Hawks for appellant.

Ansley Wilcox for respondent.

Agree to affirm. No opinion.

All concur, except TRACY, J., absent.

Judgment affirmed.

FANNY SEMEL, as Administratrix, etc., Respondent, v. THE
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COM-
PANY, Appellant.

(Argued January 23, 1888; decided February 6, 1888.)

H. H. Anderson for appellant.

Gibson Putzel for respondent.

Agree to affirm. No opinion.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

JOSEPH M. KOEHLER, Appellant, v. SOLOMON ADLER, Adminis-
trator, etc., Respondent.

(Argued January 24, 1888; decided February 6, 1888.)

THIS action was brought to recover an alleged loan. It is reported upon a former appeal in 78 N. Y. 287. The evidence was substantially the same as on the former trial, and the court held as on the former appeal that a question of fact was presented for the jury.

Plaintiff claimed that the loan was made by a check given by him to defendant's intestate. The defense claimed that

the check was in fact given in the business of the Stonewall Oil Company, of which corporation the decedent was president and plaintiff the treasurer, the latter keeping no separate bank account of the moneys of the corporation, but depositing them in his own name, and drawing his individual checks when payments were made on corporate contracts or liabilities.

The plaintiff offered himself as a witness on the trial, and was asked by his counsel whether the check in question had any thing to do with the affairs of the Stonewall Oil Company. This was objected to on the ground that it called for a personal transaction with the decedent, and was incompetent under section 829 of the Code. The objection was sustained, and it was claimed that the ruling of the court in excluding the evidence was erroneous.

The court here say: "We are of opinion that this point is not tenable. The check on its face imported a personal transaction between the plaintiff and the intestate. The point in issue was whether it related to an individual transaction of Koehler's, or to a transaction by him as treasurer of the Stonewall Oil Company. The giving of the check was consistent with either theory, and when the witness was asked whether it had any thing to do with the affairs of the Stonewall Oil Company, he was called upon by his answer to characterize the transaction either as an individual or a corporate one. The answer to the question would necessarily show what the transaction was, and the plain purpose of the inquiry was to negative the possible inference from the circumstances that the check was given by the plaintiff as treasurer of the oil company. It is not the test of the admissibility of the evidence that an answer in the affirmative would have been adverse to the interest of the plaintiff, but whether proof of the fact to which the inquiry related would involve a disclosure of the nature of the transaction at the time the check was given.

The case of *Pinney v. Orth* (88 N. Y. 451) does not determine the question before us. In that case a witness for the plaintiff's intestate had testified to a conversation between the intestate and the defendant, in his presence, and it was held that it was competent to prove by the defendant that he never

had a conversation with the deceased at the place stated by the witness, when the witness was present. This was not an attempt to prove what occurred at the conversation spoken of, and while it might, by discrediting the testimony of the witness, justify the inference that the conversation related by him never was had, it was held that this fact did not render the testimony improper. In this case it is conceded that there was a personal transaction between the plaintiff and the intestate, and the fact offered to be shown by the plaintiff was inseparable from the transaction itself, and whichever way he might have answered it, the direct effect would have been to disclose the character of that transaction. We think that the general denial in the answer authorized the defendant to show the facts in respect to the transaction with the Stonewall Oil Company. It tended to disprove the allegation of a personal loan by the plaintiff, and to show that when the suit was brought there was no subsisting cause of action. (*Young v. Rummell*, 2 Hill, 478.)"

William Henry Arnoux for appellant.

Samuel Boardman for respondent.

ANDREWS, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

PATRICK MURRAY, as Administrator, etc., Appellant, v. THE
TROY AND WEST TROY BRIDGE COMPANY, Respondent.

(Argued January 28, 1888; decided February 6, 1888.)

Rufus W. Peckham for appellant.

Samuel Foster for respondent.

Agree to affirm. No opinion.

All concur, except DANFORTH and FINCH, JJ., dissenting,
and RAPALLO, J., absent.

Judgment affirmed.

DAVID M. TALMAGE, Respondent, v. EDWARD N. WHITON et
al., Appellants.

(Argued January 30, 1888 ; decided February 6, 1888.)

E. M. De Witt for motion.

Moody B. Smith opposed.

Motion to dismiss appeal granted. No opinion.

All concur.

Appeal dismissed.

EVERETT JOHNSON, Respondent, v. SARAH N. CORNWALL et al.,
Appellants.

(Argued January 29, 1888 ; decided February 9, 1888.)

REPORTED below (26 Hun, 499).

Calvin Frost for appellants.

Austin G. Fox for respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

CHARLES A. LANGDON, Respondent, v. ROSEALGINE A. GUY,
Appellant.

(Argued January 30, 1888 ; decided February 9, 1888.)

THIS was an appeal from an order of General Term affirming an order of Special Term, which directed a readjustment of plaintiff's costs and an allowance of full costs on the ground that the title to lands was put in issue by the pleadings.

The action was for assault and battery. The complaint alleged that "defendant wrongfully and unlawfully entered upon the premises of the plaintiff and into his dwelling-house," and there committed the assault and battery complained of.

The defendant's answer was: *First*, a general denial; *Second*, an averment that Henry D. Langdon owned the premises; that plaintiff wrongfully and unlawfully entered the house and assaulted said Langdon, and thereupon defendant, the servant of said Langdon, under his orders, resisted the assault and removed plaintiff from the house; and *Third*, that defendant was deputy sheriff, and as such in defense of said Langdon, and in resisting an assault upon him by defendant, removed him from the house as aforesaid, which was the act complained of. Plaintiff recovered a judgment for \$25, and his costs were taxed at that sum.

The court here say: "We think title to land is not brought in question by the pleadings. No injury to the freehold is alleged in the complaint, nor are damages claimed for entering upon the premises. The injury for which indemnity is sought was to the person, and the defense set up was that the acts complained of were committed in defense of certain parties, who, being first assaulted by the plaintiff, requested the assistance of the defendant, as their servant. Upon the face of the papers nothing more appears than a simple assault and battery, and justification, and as no certificate was given that the title to lands came in question upon the trial, and the recovery was less than \$50, we think the plaintiff was entitled to no more costs than damages. (Code, § 3228, sub. 1 and 3.)

It is true the complaint alleges that the defendant wrongfully entered the plaintiff's grounds and house and there committed the assault, and the answer, besides a general denial, avers that one Henry D. Langdon was the owner of the house, but these allegations seem mere matters of description, and not facts upon which the right of either party depends. The violence of neither was exerted to obtain or defend possession or title."

L. H. Northrup for appellant.

U. G. Paris for respondent.

DANFORTH, J., reads for reversal of orders of General and Special Term and for denial of motion.

All concur.

Ordered accordingly.

THE METROPOLITAN CONCERT COMPANY (Limited), Respondent,
v. HENRY E. ABBEY et al., Appellants.

(Argued January 30, 1883 ; decided February 9, 1883.)

William F. Howe for appellants.

John S. Davenport for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

MARGARET SAEVENT et al., Respondents, v. EDWARD D.
HESDRA, Impleaded, etc., Appellant.

(Submitted January 30, 1883 ; decided February 9, 1883.)

REPORTED below (26 Hun, 550).

Quentin McAdam for appellant.

Dorshheimer, Bacon & Deyo for respondents.

Agree to affirm. No opinion.

All concur.

Order affirmed.

GEORGE MARK, Respondent, v. THE NATIONAL FIRE INSURANCE
COMPANY OF NEW YORK, Appellant.

(Argued October 18, 1882 ; decided March 6, 1883.)

REPORTED below (24 Hun, 565).

Matthew Hale for appellant.

R. A. Parmenter for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

DWIGHT M. FURMAN, Respondent, v. CHARLES J. JOHNSON,
Appellant.

(Argued December 7, 1882 ; decided March 6, 1883.)

A. N. Sheldon for appellant.

D. L. Atkins for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

DWIGHT H. FURMAN, Respondent, v. CHARLES J. JOHNSON,
Appellant.

(Argued December 7, 1882 ; decided March 6, 1883.)

A. N. Sheldon for appellant.

D. L. Atkyns for respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

CHARLES H. RABERY, Jr., as Executor, etc., Respondent, *v.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COM-
PANY, Appellant.

WILLIAM F. DRAKE et al., Respondents, *v.* THE SAME, Appellant.

ALEXANDER MONROE, Respondent, *v.* THE SAME, Appellant.

THESE cases presented the same questions and were argued
and decided with *Jermain v. L. S. & M. S. R. Co.* (*ante*, p. 483).

CONRAD CRAMER, as Administrator, etc., Appellant, *v.* JOHN
CHESTER et al., Respondents.

(Submitted February 5, 1883; decided March 6, 1883.)

DECIDED on the facts.

W. A. Beach for appellant.

Sidney S. Harris for respondents.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

ANNE MANNING, as Administratrix, etc., Respondent, *v.* THE
PORT HENRY IRON ORE COMPANY OF LAKE CHAMPLAIN, Ap-
pellant.

Under the provision of the act of 1870 (Chap. 78, Laws of 1870) in refer-
ence to compensation for causing death by negligence, which provides

that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the interest.

It seems that the remedy of the defendant in such case, if any, is to move to set aside the verdict.

(Argued February 8, 1883; decided March 6, 1883.)

THIS was an appeal from an order of General Term, reversing an order of Special Term, which denied a motion to strike from the entry of judgment the sum of \$933.92 added to the verdict and inserted in the entry of judgment by the clerk as and for interest on the verdict, and modifying the judgment by striking out such item. (Mem. of decision below, 27 Hun, 219.)

The action was to recover damages for alleged negligence causing the death of plaintiff's intestate.

Upon the trial of the action, the jury came into court and were inquired of, by the clerk, whether they had agreed upon their verdict, and announced, through their foreman, that they had agreed upon a verdict for the plaintiff in the sum of \$3,000. The clerk thereupon made a formal entry of the rendition of this verdict for the plaintiff in the minutes.

Afterward, the plaintiff's counsel called the attention of the court to the statute on the subject, and inadvertently suggested that the clerk be instructed to add interest to the verdict, in accordance with its provisions. The learned judge replied: "I don't know about that; I'll see." And directed the jury to retire and consider the matter. The jury subsequently informed the judge, as follows: "We intend to include interest to date." The clerk then made this entry in his minutes: "The jury, on being inquired of by the court whether they intended to include interest, by the direction of the court, the jury retired to consider the matter and again returned into court and said they included interest to date." This entry, however, was so made without any direction from the court, and was never read, or its substance stated to the jury or assented to by them in any way.

The court here say : "The statute under which this recovery was had (Chap. 78, Laws of 1870) provides that the amount of damages recovered shall draw interest from the time of the death of the person killed, 'which interest shall be added to the verdict and inserted in the entry of the judgment.' The jury have nothing to do with the interest. That is to be added to the damages, and inserted in the entry of the judgment by the clerk. Here the jury rendered a verdict for \$3,000. It matters not now how or by what process of reasoning or method of computation they arrived at it. That was their verdict, and to that the clerk was directed by the statute to add the interest. If the jury in fact included interest in making up the amount of damages awarded by them, the remedy of the defendant, if any, was to move to set aside the verdict upon that ground. That it did not do, and it must fail in its motion to strike out the interest added by the clerk in strict conformity to the statute."

Samuel Hand for appellant.

M. D. Grover for respondent.

Per curiam opinion for reversal of order of General Term and affirmance of that of Special Term.

All concur.

Ordered accordingly.

ANNE MANNING, as Administratrix, etc., Respondent, v. THE
PORT HENRY IRON ORE COMPANY OF LAKE CHAMPLAIN,
Appellant.

(Argued February 8, 1888 ; decided March 6, 1888.)

M. D. Grover for appellant.

Samuel Hand for respondent.

Per curiam. Mem. for affirmance on ground that evidence was sufficient to sustain verdict.

All concur.

Judgment affirmed.

WILLIAM E. SAWYER, Plaintiff in Error, v. THE PEOPLE OF THE
STATE OF NEW YORK, Defendant in Error.

It seems that upon the trial of an indictment for an assault with a deadly weapon, the assault being proved, the burden is upon the accused to establish the existence of sufficient cause to justify the use of such a weapon.

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(Submitted February 9, 1883; decided March 6, 1883.)

PLAINTIFF in error was indicted for an assault with intent to injure. It was proved by the prosecution on the trial that the prisoner fired a pistol at one Steele, inflicting a dangerous wound. The question litigated on the trial was whether, at the time of the shooting, the prisoner had reasonable grounds to believe that the complainant intended to make an assault upon him, and that such assault placed his life in jeopardy. The court here say: "We have carefully examined the evidence taken on the trial, and found it difficult to harmonize the statements of the witnesses, but for that very reason a question was presented peculiarly adapted to the judgment and consideration of the jury. The burden would seem to rest upon the defendant to establish to the satisfaction of the jury the existence of sufficient cause to justify him in the use of a deadly weapon, such as he concededly used on this occasion. Upon the evidence in this case, we think the jury were justified in saying that the existence of such cause was not established to their satisfaction, although if they had found the other way, there would have been no ground upon which to disturb their verdict.

"We have also carefully examined the several exceptions taken by the plaintiff in error to the rulings of the court appearing in the record.

"While the counsel for the defendant in his printed points questions three of such rulings, but two of them are shown by the record to have been taken by him. These relate to the exclusion by the court of answers to the following questions put to defendant's witnesses by his counsel.

"In your association with him it has been your observation that he is a peaceable character, his disposition as to peaceableness?' *Second*. 'What is your judgment as to his disposition as to peacefulness or quarrelsomeness?'

"Each of the witnesses to whom these questions were put were allowed to answer all questions relating to the general character of the defendant, although they showed but slight acquaintance with it and were allowed to and gave favorable answers to questions referring to his character for quietness and peacefulness. While we think, from the circumstances, no possible injury could happen to the defendant by the exclusion of the evidence objected to, we also think the questions were objectionable as being leading and calling for the opinions of the witnesses as to the character of the accused based upon their personal observation. It was competent for the defendant to call witnesses as to his general reputation and character, but this is as far as the law permits him to go."

William F. Howe for plaintiff in error.

John Vincent for defendant in error.

RUGER, Ch. J., reads for affirmance.

All concur, except ANDREWS, J., not voting, and RAPALLO, J., absent.

Judgment affirmed.

JULIUS CATLIN, Jr., et al., Respondents, v. WILLIAM H. RIOK-
ETTS, Receiver, etc., Impleaded, etc., Appellant.

WILLIAM L. POMEROY, et al., Appellants, v. THE SAME, Re-
spondent.

ADOLPH BERNHEIMER, Appellant, v. THE SAME, Respondent.

Where within thirty days after the granting of an attachment the defend-
ant, against whom it was issued, appeared generally in the action, *held*,

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that this was equivalent to a personal service of the summons, and met the requirement of the provision of the Code of Civil Procedure (§ 638), that the summons shall be served within thirty days after granting of the attachment; that said provision must be read with the provision (§ 424), making a voluntary general appearance "equivalent to personal service of the summons."

Blossom v. Estes (84 N. Y. 615), distinguished.

An appeal does not lie to this court from an order vacating an attachment, unless it appears in the order appealed from that the attachment was set aside for want of power to grant it, or upon some ground involving jurisdiction of the court.

(Argued March 6, 1888, decided March 13, 1888.)

IN the case first entitled, an attachment was issued and a motion was made to vacate it, apparently upon the ground that the summons had not been served within 30 days, upon the defendants, as required by section 638 of the Code of Civil Procedure. The motion was granted upon that ground and then the plaintiff appealed to the General Term where the order of the Special Term was reversed. The defendants appealed to this court.

The court here say: "We are of opinion that the decision of the General Term was right. It is true that section 638 requires that the summons shall be served within 30 days after the granting of the attachment; but section 424 of the Code must be read with section 638, and that provides that the 'voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.' Here both of the defendants, against whom the attachment was granted appeared in the action generally within the 30 days, and that for all purposes of the action was equivalent to a personal service of the summons. It would have been a very idle ceremony for the plaintiff to procure personal service of the summons upon the defendants after they had put in a general appearance in the action. Nothing to the contrary of this was decided in the case of *Blossom v. Estes* (84 N. Y. 615). In that case the summons was not served within 30 days, and it was therefore held that the attachment fell, and that a subsequent appearance did not revive it or give it new vitality."

In the last two cases above entitled, the attachments were va-

cated at Special Term and the orders of the Special Term were affirmed at the General Term. It does not appear in the orders appealed from that the attachments were set aside for the want of power to grant them, or upon any ground involving the jurisdiction of the court. It appears from the opinions pronounced at the General Term, that the right to an attachment in each case was denied upon the ground that the affidavits did not sufficiently show a cause of action in favor of the plaintiff against the defendants, as required by sections 636 and 637, of the Code. The court say: "We agree with the General Term. But we have frequently held that an appeal does not lie to this court from such an order."

Melville H. Regensbergher for plaintiffs.

C. W. West for appellants.

EARL, J., reads for affirmance of order in case first above entitled, and for dismissal of appeal in the other two cases.

All concur.

Ordered accordingly.

THE PEOPLE, ex rel. THE AMERICAN FIRE INSURANCE COMPANY, Appellant, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK, Respondent.

(Argued March 6, 1883; decided March 13, 1883.)

REPORTED below (28 Hun, 261).

Charles E. Miller for appellant.

George P. Andrews for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

THOMAS McNAMARA, Respondent, v. CANADA STEAMSHIP COMPANY (Limited), Appellant.

(Argued March 6, 1888 ; decided March 13, 1888.)

C. Stewart Davison for appellant.

Thomas Nolan for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

In the Matter of the application of ALBERT SCHNITZLER to compel RUFUS F. ANDREWS, Receiver, etc., to pay Judgment.

(Argued March 6, 1888 ; decided March 13, 1888.)

John C. Keeler for appellant.

Henry W. Johnson for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, v. THE TENTH NATIONAL BANK OF THE CITY OF NEW YORK, Appellant.

(Argued March 6, 1888 ; decided March 13, 1888.)

William Hildreth Field for appellant.

John H. Strahan for respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

THE PEOPLE, ex rel. NAPOLEON X. ARCHAMBAULT, Respondent, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF ULSTER, Appellant.

Under the provisions of the Military Code (§§ 124, 125, chap. 80, Laws of 1870, as amended by chap. 223, Laws of 1875) authorizing the commanding officer of each regiment, etc., to appoint a person to take charge of the armory, whose compensation, within the prescribed limits as certified by the commanding officer, shall be a county charge, the board of supervisors of the county has no jurisdiction to audit or review the amount of compensation so certified, the board has no other duty in reference thereto, except to cause the amount to be levied, collected and paid like other county charges.

An allowance for Sundays necessarily employed in caring for the armory is not prohibited or condemned by any statute, and the supervisors have no authority to deduct such an allowance.

(Argued March 6, 1883; decided March 13, 1883.)

THIS was an appeal from order of General Term, affirming an order of Special Term, granting a writ of peremptory *mandamus* directing defendant to raise, levy and pay to the relator the amount of his bills for services in caring for the armory of the Twentieth Battalion, N. G. S. N. Y., situate at Kingston, as certified to by the commanding officer. The bills were presented to defendant who struck out the allowance for fifty-six days, which were Sundays.

The court here say: "We are of opinion that the peremptory *mandamus* was properly granted. The relator was properly and legally appointed to take charge of the armory at Kingston. It is undisputed that he rendered the services charged in his bill, and that his bill was properly certified by the commanding officer who appointed him. The amount of the bill thus certified became a charge upon the county of Ulster, and the supervisors had no other duty in reference thereto, except to cause the amount of the bill to be levied, collected and paid like other county charges. (Secs. 124 and 125 of chap. 80 of the Laws of 1870, as amended by chap. 223 of the Laws of 1875.) The board of supervisors had no power or jurisdiction to audit or review the amount of compensation allowed and certified by the commanding officer. The supervisors had no right to deduct all the Sundays upon

which the relator rendered services, upon any theory. It appears from the affidavits, and from the nature of the employment, that services were as necessary upon Sundays as upon any other day of the week, and they are, therefore, not prohibited or condemned by any statute. The order should be affirmed."

Howard Chipp, Jr., for appellant.

Walter S. Kenyon, Jr., for respondent.

EARL, J., reads for affirmance.

All concur.

Order affirmed.

MARIE DOLD *v.* GEORGE A. HAGGERTY, impleaded, etc., Appellant, IRVING NATIONAL BANK, Respondent.

(Argued March 6, 1883; decided March 13, 1883.)

Samuel Untemeyer for appellant.

Gratz Nathan for respondent.

Agree to affirm. No opinion.

All concur.

Order affirmed.

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ACTION.

An action in the Supreme Court against a National bank need not be brought in the county where the bank is located, but may be brought in any county where the plaintiff resides. *Talmage v. Third Nat. Bk.* 531

ADMISSION AND DECLARATION.

— *As to admissibility as evidence on criminal trial of confessions of prisoner.*

See People v. McGloin. 241

— *When evidence of admissions and declarations of opposing witness competent.*

See Homer v. Everett. (Mem.) 641

ALIMONY.

1. It is only when an action is brought by a wife for divorce or separation, as prescribed by the Code of Civil Procedure, § 1766, that an allowance for alimony is proper. *Ramsden v. Ramsden.* 281

2. Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, *held*, that the court had no jurisdiction to make an order granting alimony *pendente lite* or counsel fees. *Id.*

APPEAL.

1. As to whether the provision of the Code of Criminal Procedure (§ 527, as amended in 1882, chap. 360, Laws of 1882), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære.* *People v. McGloin.* 241

2. In an action against an executor, costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer. *Held*, that as defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (§ 1836). *Meltzer v. Doll.* 365

3. Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, after a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here. *People, ex rel. Hartf. L. & An. Co., v. Fairman.* 385

4. Among other assets left by a tes-

tator, which, by the will, his executors were directed to convert into money, was an interest in certain real estate which was incumbered by mortgages. The executors failed to sell; they paid off the incumbrances and expended further sums of money for taxes, and in the care and preservation of the property. A large proportion of said expenditures were after the expiration of the eighteen months. In the executors' accounts the items of payment upon the mortgages were entered as debts allowed and paid in a statement of "moneys paid, * * * to the creditors of the deceased." Certain contestants, among whom were infants, who appeared by special guardian, filed specific objections to the accounts. No objection was stated to the payment of the mortgages. The accounts were sent to an auditor; after the close of the evidence before him, the adult contestants stated that they would not press any objections to the accounts, in respect to said property. The guardian for the infant contestants filed no exceptions to the auditor's report, the adult contestants did; the surrogate decided that the notice given the auditor was equivalent to a withdrawal of all objections as to said expenditures. The adult contestants appealed, the special guardian did not. *Held*, the objection that the infants did not join in the notice, and so were not bound thereby, could not be urged upon the appeal; that the adult contestants were bound by their own action, and the infants by the decree, which, as they had not appealed, was conclusive as to them. *In re Estate of Weston*. 502

5. A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in an action triable by the court, may, "in the discretion of the court which reviews it, be disregarded, if it is of opinion that substantial justice does not require that a new trial should be granted." (Code of Civil Procedure, § 1003.) *Post v. Mason*. 539

6. An appeal does not lie to this court from an order vacating an attachment, unless it appears in the order appealed from that the attachment was set aside for want of power to grant it, or upon some ground involving jurisdiction of the court. *Catlin v. Ricketts*. 668

— *When findings of jury as to marriage, and legitimacy of children conclusive.*

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APPEARANCE.

— *Voluntary general appearance equivalent to personal service of summons within provision of Code of Civil Procedure (§ 638), requiring summons to be served within thirty days after granting an attachment.*

See Catlin v. Ricketts. 668

ARBITRATION.

Plaintiff and L. M. H., her testatrix executed a lease under seal of their interests to defendant, who went into possession under it. Subsequently, differences having arisen, the parties entered into an agreement under seal to submit the matters in difference to arbitrators, which contained a provision that "the lease shall be surrendered," the arbitrators to determine how much damage or compensation, if any, shall be paid by the lessors to the lessee "for such surrender." The lease was delivered to the arbitrators, who made an award which was set aside as void. Thereafter, L. M. H. and one of the arbitrators died. In an action to recover rent reserved by the lease, *held*, that the agreement to arbitrate, at the moment of its execution, operated as a surrender and cancellation of the lease; that neither the failure to make a valid award, nor the revocation of the submission by death of one of the arbitrators or of one of the parties operated to revive the lease; and that, therefore, the action was not maintainable. *Harris v. Hiseock*. 340

See AWARD.

ASSAULT AND BATTERY.

—When title to land not brought in question by pleadings in action for assault and battery so as to entitle plaintiff to full costs when judgment is less than \$50.

See *Langdon v. Guy*. (Mem.) 680

ASSAULT WITH DEADLY WEAPON.

It seems that upon the trial of an indictment for an assault with a deadly weapon, the assault being proved, the burden is upon the accused to establish the existence of sufficient cause to justify the use of such a weapon. *Sawyer v. People*. 667

—Evidence of character of prisoner as a peaceful man, not competent on trial of indictment for assault with deadly weapon, evidence should be confined to general reputation and character. *Id.*

ASSESSMENT AND TAXATION.

1 Prior to the passage of the New York city charter of 1873 (Chap. 835, Laws of 1873), a plan for the drainage of the "Boulevard" throughout its whole extent had been prepared and approved by the proper authorities. The sewers were divided into five sections or districts, each independent of and entirely disconnected with the others, having a different outlet and capable of being separately constructed without regard to the others. A separate assessment was made for the work in each section. When the charter was adopted some work had been done upon one of the sections. *Held*, that this was not work "in progress" upon all the sections within the meaning of the exception in the provision in said charter (§ 91) in regard to letting work by contract, exempting such work from the contract system; that the sewerage of the Boulevard was not an entire work but a series of separate improvements; and that, therefore, an assessment for constructing sewers in one of the sec-

tions whereon no work had been done prior to the charter, the improvement having been done by day's work not by contract, was illegal and void. *In re Blodgett*. 117

2. Under the provision of the act "to alter the map or plan of certain portions of the city of New York" (Chap. 897, Laws of 1867), which authorizes the payment of damages caused by the closing of "any street, avenue or road laid out on the map of the city of New York within the district specified," the owners of property fronting on the old "Bloomgindale road" were entitled to compensation for the closing thereof. By incorporating into said act of 1867 the provisions of the act of 1852 (§ 8, chap. 52, Laws of 1852), providing for the payment of damages by assessment upon the property benefited, it was the intention of the legislature to make the damages caused by the closing of said road payable by assessment, as so provided; and, therefore, *held*, that an assessment for that purpose was valid. *In re Barclay*. 480

3. A party assailing an assessment as excessive must make it appear conclusively that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed. *People, ex rel. W. F. Ins. Co., v. Davenport*. 574

4. The affidavit of a person taxed, as to the amount and value of taxable property possessed by him, presented to the assessors as the basis of a claim to be relieved from taxation, is not conclusive upon the assessors. *Id.*

5. The act of 1880 (Chap. 110, Laws of 1880) regulating the examinations and reports of fire insurance companies does not affect the status, as taxable property, of premiums upon unexpired policies held by such a company. *Id.*

6. The liability of the company to refund a part of such premiums to

- the assured upon surrender of the policies does not constitute a debt owing by it, and in assessing the value of its taxable property it cannot claim a deduction of the whole amount of unearned premiums (EARL, J., dissenting). *Id.*
7. The relator was assessed \$76,000 upon personal property; it appeared before the assessors and asked to have the same stricken from the assessment. In the affidavit upon which the application was based it was conceded that the company had \$239,600 of personal property subject to taxation unless exempt by reason of its contingent liability for unearned premiums, this was stated to be about \$340,000. No statement was made as to the amount of the outstanding policies, the cost of reinsuring the risks, or the method by which the amount of liability stated was reached. The assessors refused to strike out the assessment. Their return to a writ of *certiorari* did not state the evidence upon which they proceeded, but alleged that the assessment "was duly and legally made." *Held* (EARL, J., dissenting), there was no evidence showing that the assessors did not deduct from the conceded assets all the relator was entitled to have deducted on account of said contingent liabilities, and in the absence of such evidence it was to be assumed that they proceeded legally. *Id.*
8. The provision of the act "to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations" (§ 8, chap. 542, Laws of 1880), exempting from assessment and taxation, save as provided for in the act, the capital stock and personal property of the corporations, companies and associations specified, applies only to State taxation; it does not affect the right of municipal authorities to assess and tax such property for local purposes. *Id.*
9. Exemption from taxation is not favored by the courts, and unless the language of a statute is so clear and unambiguous that the intention of the legislature to create the exemption indisputably appears, such a construction will not be given to it. *Id.*
10. The authorities upon this subject collated. *Id.*
11. The act of 1881 (Chap. 361, Laws of 1881), amending said provision of the act of 1880, by expressly restricting the exemption to taxes for State purposes, and the act (§ 8, chap. 542, Laws of 1880,) legalizing and confirming the assessment and levy of taxes in the city of New York upon the corporations, etc., named, are to be considered as simply declaratory of the intent of the original act. *Id.*
12. The statutes in relation to the assessment of taxes in the city and county of New York (Chap. 302, Laws of 1859; § 4, chap. 410, Laws of 1867; § 112, chap. 335, Laws of 1873), confer no power upon the commissioners of taxes and assessments to change the record of assessments after the first day of June in any year. *People, ex rel. 23d St. R. R. Co., v. Comm'rs of Taxes, etc.* 593
13. *It seems* that none of the municipal authorities have any judicial duty to perform after that date, in relation to the assessment of property, or the collection of taxes, save the board of supervisors, and they only when it appears "under oath or affirmation that the party aggrieved was unable to attend within the period prescribed for the correction of taxes by reason of sickness or absence from the city" (§ 10, chap. 230, Laws of 1859). *Id.*
14. As, therefore, the act of 1880 (Chap. 542, Laws of 1880), providing for the taxation of certain corporations, companies and associations, was not passed until June 1st of that year, and as it contains no provisions giving it a retroactive effect, or providing for the contingency, it imposed no duty upon said commissioners, so far as the

assessment and collection of taxes for that year were concerned. *Id.*

15. The provision of the act of 1880 (§ 1, chap. 269, Laws of 1880) in regard to the review and correction of assessments by *certiorari* confers upon the court the power of review and correction, only when it appears by the return to the writ or the evidence taken thereunder, "that the assessment complained of is illegal, erroneous or unequal." It does not authorize a review where it appears that the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory upon the assessors. *Id.*

16. Where, therefore, it appeared by the return to a writ of *certiorari* to review an assessment upon the personal property of the relator, which was alleged to be illegal, because of the exemption contained in the act of 1880 (Chap. 542, Laws of 1880) that the assessment was made before May 1, 1880, in accordance with the then existing law; *held*, that the assessment was properly affirmed *Id.*

ASSIGNMENT.

1. On August 1, 1878, the M. Bank of Kansas City had a balance to its credit in the hands of D., L. & Co., its agents and correspondents in the city of New York. M. was a depositor in said bank, and it was on that day indebted to him in the sum of \$5,000. M. was also a depositor with D., L. & Co. It was the practice of the parties, founded on a prior agreement, for the M. Bank, at the request of M., to provide funds for his account with D., L. & Co., by ordering the latter to transfer from its account to that of M. such sums as it was directed by M. to remit. In accordance with this agreement and custom M., on July 30, 1878, wrote to the M. Bank to remit \$5,000 to D., L. & Co. for his credit and charge his account with the same. This letter was received by the M. Bank; it thereupon charged M. with the

\$5,000 and credited itself therewith and also credited D., L. & Co. with the same amount, and on August first mailed to M. a letter stating it had remitted for his credit the sum required. On the same day it sent to D., L. & Co. a paper signed by its proper officers directing that firm to "pay to the order of credit, M., \$5,000." A formal letter of advice was also sent to D., L. & Co. in the same envelope. On August 3, the M. Bank assigned all its property to plaintiff for the benefit of creditors. On August 5, plaintiff notified D., L. & Co. by telegram of the assignment, which notice was received by that firm about two hours before receipt of the letter of advice and order. In September plaintiff demanded payment of the apparent balance, which D., L. & Co. refused to pay over. In an action to recover the same, *held*, that the transaction, as between the parties, amounted to an assignment to M. as of August 1, of \$5,000 of the indebtedness of D., L. & Co. to the M. Bank; that it was not essential to a valid transfer that D., L. & Co. should be apprised of it; that plaintiff, as voluntary assignee, occupied no better position than his assignor; that the paper directing payment sent by the M. Bank to D., L. & Co. was not intended or delivered as a bill of exchange and was not a necessary act so far as title was concerned, but was effectual only as a voucher or notice of the rights of M.; and that the latter was entitled to the sum in question. *Coates v. First Nat. B'k.* 20

2. S. and K. entered into a contract for the sale by the former, and purchase by the latter, of certain premises, the purchase-price to be paid by installments, S. to convey, "by good and sufficient deed," when all the purchase-money was paid. K. entered into possession under the contract; S. assigned the contract for full value to E., defendant's testator; K. assented thereto, and after making a payment upon the contract to E., assigned his interest therein to H., who paid the balance and then demanded of E. a deed or re-payment of the moneys

paid. The title to the land was not in fact in S. and he, when the last payment was made, was insolvent. *Held* (EARL, J., dissenting), that in the absence of any proof of fraud or bad faith, an action was not maintainable against E. to recover back the money paid; that the assignment to E. transferred no title to the land and imposed upon him no obligation; that the money he received was actually due to him, and that there could be no obligation to refund it; that plaintiff's remedy was by action against S. *Youmans v. Edgerton*. 403

8. The referee found that at the time of payment the parties were ignorant that the title was not in S. *Held* immaterial; that the mistake did not create any obligation on the part of E. *Id.*

— *Of stock carriers with it right to subsequently declare dividends.*

See Jermain v. L. S. & M. S. R. Co. 483

ATTACHMENT.

1. Where, within thirty days after the granting of an attachment, the defendant, against whom it was issued, appeared generally in the action, *held*, that this was equivalent to a personal service of the summons, and met the requirement of the provision of the Code of Civil Procedure (§ 688), that the summons shall be served within thirty days after granting of the attachment; that said provision must be read with the provision (§ 424), making a voluntary general appearance "equivalent to personal service of the summons." *Catlin v. Ricketta*. 668

2. An appeal does not lie to this court from an order vacating an attachment, unless it appears in the order appealed from that the attachment was set aside for want of power to grant it, or upon some ground involving jurisdiction of the court. *Id.*

— *A construction given to the provision of Code of Civil Procedure*

(§ 1421), providing where action is brought against officer to recover chattels levied on by execution, or attachment, if bond of indemnity has been given him, that the obligor may be substituted as defendant, and its effect stated.

See Hassberg v. Riley.

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ATTORNEY.

Where a will executed by one, having full testamentary capacity, and duly admitted to probate, contained a legacy to the draughtsman, an attorney, who, at the time of the execution of the will, was, and for a long time previous had been, the counsel of the testator, *held*, that this alone did not raise a presumption, in aid of one seeking to overthrow the will, that the influence of the attorney was unduly exercised, nor did it, in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled; that it was for the plaintiff therefore, in an action brought to set aside the will to give some other evidence tending to show fraud or undue influence. *Post v. Mason*. 589

— *Lien of attorneys, on judgment, how affected by discharge in bankruptcy of judgment debtors.*

See Blumenthal v. Anderson. 171

ATTORNEY AND CLIENT.

— *Authority to attorney to appear for defendant in justice's court, gives him power to make offer of judgment.*

See Fowler v. Haynes. 346

AWARD.

1. It is no objection to an award of an arbitrator that he did not hear the parties or take their evidence, when it appears that they waived a hearing, and that it was intended that the arbitrator should decide the matter submitted upon his personal knowledge and inspection. *Widery v. Matthews*. 648

2. An award, if valid, is a bar to an action on the original claim. *Id.*

BANKS AND BANKING.

1. On August 1, 1878, the M. Bank of Kansas City had a balance to its credit in the hands of D., L. & Co., its agents and correspondents in the city of New York. M. was a depositor in said bank, and it was on that day indebted to him in the sum of \$5,000. M. was also a depositor with D., L. & Co. It was the practice of the parties, founded on a prior agreement, for the M. Bank, at the request of M., to provide funds for his account with D., L. & Co., by ordering the latter to transfer from its account to that of M. such sums as it was directed by M. to remit. In accordance with this agreement and custom M., on July 30, 1878, wrote to the M. Bank to remit \$5,000 to D., L. & Co. for his credit and charge his account with the same. This letter was received by the M. Bank; it thereupon charged M. with the \$5,000 and credited itself therewith and also credited D., L. & Co. with the same amount, and on August first mailed to M. a letter stating it had remitted for his credit the sum required. On the same day it sent to D., L. & Co. a paper signed by its proper officers directing that firm to "pay to the order of credit, M. \$5,000." A formal letter of advice was also sent to D., L. & Co. in the same envelope. On August 3, the M. Bank assigned all its property to plaintiff for the benefit of creditors. On August 5, plaintiff notified D., L. & Co. by telegram of the assignment, which notice was received by that firm about two hours before receipt of the letter of advice and order. In September plaintiff demanded payment of the apparent balance, which D., L. & Co. refused to pay over. In an action to recover the same, *held*, that the transaction, as between the parties, amounted to an assignment to M. as of August 1st, of \$5,000 of the indebtedness of D., L. & Co. to the M. Bank; that it was not essential to a valid transfer that D., L. & Co. should be apprised of

it; that plaintiff, as voluntary assignee, occupied no better position than his assignor; that the paper directing payment sent by the M. Bank to D., L. & Co. was not intended or delivered as a bill of exchange, and was not a necessary act, so far as title was concerned, but was effectual only as a voucher or notice of the rights of M.; and that the latter was entitled to the sum in question. *Coates v. First Nat. B'k.* 20

2. A check, dated November 9, 1874, drawn upon plaintiff, a New York city bank, the indorsement of the payees whereon had been forged, was paid by it to defendant, who had received it from a depositor in the regular course of business, and charged it to the drawer's account. In March, 1876, the drawers notified plaintiff of the forgery and commenced suit against it to recover the moneys withheld by it on account of the check. Notice of the suit was given to defendant, judgment was recovered therein against plaintiff, and after payment thereof this action was brought. It appeared that neither plaintiff nor the drawer of the check took any measures to ascertain the genuineness of the indorsement until about the time of the commencement of the action; that if this had been done the forgery would have been discovered, and defendant, if it had been notified thereof, could have protected itself from loss by calling upon its depositor. *Held*, that defendant was liable for the amount of the check with simple interest from the time of payment; that no duty to defendant rested on plaintiff to examine and ascertain as to the genuineness of the indorsement before paying; and that it was not estopped by the delay; but that defendant was not liable for the costs in the suit against plaintiff; that having failed in its duty to its depositors it could not charge the expense of an action caused by such default upon a third person. *Corn Ex. B'k v. Nassau B'k* 74

3. Also *held*, that evidence was properly excluded of a usage 86

among banks in the city of New York, making it plaintiff's duty to examine and satisfy itself as to the genuineness of the indorsement and to return the same immediately if not good. *Id.*

— *Liability of bank to depositor for amount paid on checks on which the indorsement of payee is forged.*

See Bank of B. N. A. v. M. N. Bank. 106

— *Liability of sureties upon bond given by cashier of bank, upon his appointment.*

See Bostwick v. Van Voorhis. 353

*See NATIONAL BANKS.
SAVINGS BANKS.*

BANKRUPTCY.

1. A judgment having been perfected in this action against plaintiff for costs, and for damages occasioned by a temporary injunction issued therein, a settlement was made between the parties and a release executed by defendants in fraud of the rights of H. & B., their attorneys, which release was set aside on motion. An action was then brought by said attorneys against the parties herein to determine and enforce their lien upon the judgment. Before the trial thereof the plaintiff here was discharged in bankruptcy. Judgment was rendered and perfected adjudging the former judgment to be in full force and unpaid, and that the attorneys had a lien to an amount specified, and were entitled to enforce a collection thereof. On motion under the Code of Civil Procedure (§ 1268), to have the judgment herein canceled and discharged of record because of the discharge in bankruptcy, *held*, that plaintiff was not barred by the judgment in favor of the attorneys; that said judgment had no other effect than to determine the extent of and to enforce their lien, leaving the original judgment, like other debts of the bankrupt, subject to the bankrupt law; and that he was entitled to the relief sought. *Blumenthal v. Anderson.* 171

2. In an action by an assignee in bankruptcy to set aside certain chattel mortgages executed by the bankrupt, it appeared that the mortgagor had authority to sell on credit, taking business paper, which the mortgagee agreed to accept as payment; also that the former had permission to invest a portion of the proceeds of sales in the purchase of other property, in which case renewal mortgages were to be given, covering such purchases. Payments were made from time to time, and renewal mortgages were given. It was claimed by plaintiff that sales were made of the mortgaged property by the mortgagor to an amount more than sufficient to pay the mortgage debt, and that as against creditors it was to be considered as paid. One of the renewal mortgages was given after the alleged sales. It did not appear that any of the creditors represented by plaintiff were creditors at the time said mortgage was given. *Held*, that, as it did not appear that any adverse lien upon or right affecting the property existed at the time, it was competent for the parties to the mortgage to deal with each other in accordance with the actual condition of the indebtedness; and although sales had been made, the proceeds whereof were not applied, it was immaterial. *Brackett v. Harvey.* 214

3. Two other renewal mortgages were executed within two months prior to the filing of the petition in bankruptcy. *Held*, that as said mortgages were given in performance of the original contract, which ante-dated the two months, and as, therefore, the mortgagee had an equitable right to compel their execution, they were not unlawful preferences within the meaning of the Bankrupt Act, but were valid; and this, although taken with knowledge on the part of the mortgagee that the mortgagor was insolvent, in the absence of evidence that he knew that they were executed in fraud of the provisions of the Bankrupt Act. *Id.*

4. But *held*, that this contract right

to a lien upon newly-acquired property was confined to such as was purchased with the avails of property originally mortgaged, and if any of the property covered by the last two mortgages was not included in the prior mortgages and was not paid for out of such avails, as to such portion the mortgages were within the prohibition of said act. *Id.*

5. In an action upon a promissory note, given February 21, 1871, for \$1,000, by D., defendant's testator, to the firm of M. Bros., plaintiff gave evidence tending to show that the consideration of the note was an agreement on the part of said firm to take up and suspend prosecution, for three months, upon a note, held by them, against one G. M., who had shortly before become an involuntary bankrupt, and was then being prosecuted by some of his creditors. Defendants put in evidence a deposition, made before a register in bankruptcy, to prove a debt, in bankruptcy, against G. M. The deposition was to the effect that on March 13, 1871, before the register, came J. M. and G. M., of the firm of M. Bros., and made oath that the person against whom the petition in bankruptcy had been filed was before such filing and still is "indebted to this deponent," upon a promissory note of \$1,000, given for money loaned, and that for said sum deponent had not "had or received any manner of satisfaction or security whatever." The deposition was signed by J. M., alone, and was certified by the register to have been resworn to June 5, 1871. A copy of the note was attached, which corresponded with the note, to extend and secure which the note in suit was alleged to have been given. Defendant thereupon asked to have the complaint dismissed on the ground of failure of consideration, as the note of G. M. was proved in bankruptcy within the three months. The motion was denied. *Held* no error. *First*, it was not conclusive that the two notes were identical; that no estoppel was worked as against the firm by the fact that a member thereof proved, as his

own debt, a note once held by the firm. *Second*, it would seem, from the fact that the deposition was resworn to, after the expiration of the three months, the former verification was defective, and no valid proceedings were instituted within the three months. *Third*, that proof of the debt in bankruptcy would not have been such a proceeding as would have been a breach of the agreement to forbear. *Meltzer v. Doll.* 865

6. The *ex parte* proof in bankruptcy is not such an adjudication as to the existence of a fact as to legally preclude the person making it from afterward explaining or contradicting the statements contained therein, at least as against one not in a legal sense a party. *Id.*

BILLS, NOTES AND CHECKS.

1. A check, dated November 9, 1874, drawn upon plaintiff, a New York city bank, the indorsement of the payees whereon had been forged, was paid by it to defendant, who had received it from a depositor in the regular course of business, and charged it to the drawer's account. In March, 1876, the drawers notified plaintiff of the forgery and commenced suit against it to recover the moneys withheld by it on account of the check. Notice of the suit was given to defendant, judgment was recovered therein against plaintiff, and after payment thereof this action was brought. It appeared that neither plaintiff nor the drawer of the check took any measures to ascertain the genuineness of the indorsement until about the time of the commencement of the action; that if this had been done the forgery would have been discovered, and defendant, if it had been notified thereof, could have protected itself from loss by calling upon its depositor. *Held*, that the defendant was liable for the amount of the check with simple interest from the time of payment; that no duty so defendant rested on plaintiff to examine and ascertain as to the genuineness of the indorsement before paying; and that it was not estopped by the delay; but that

defendant was not liable for the costs in the suit against plaintiff; that having failed in its duty to its depositors it could not charge the expense of an action caused by such default upon a third person. *Corn Ex. B'k v. Nassau B'k.* 74

2. On March 9, 1870, plaintiff, who had a deposit account with defendant, drew its check payable to the order of H. On the same day the check was certified by defendant's teller. On the next day it was presented by some person other than H., with her indorsement forged thereon, and was paid by defendant and the amount thereof charged to plaintiff. On March 17, 1870, in accordance with the usual course of dealing between the parties, plaintiff's pass-book was written up, balanced and returned; it contained the charge of the check, which was also delivered up as a voucher. Plaintiff had no notice or knowledge of the forgery until January, 1877; in June thereafter, it tendered the check and demanded of defendant payment of the amount thereof, and brought this action to recover the same in November, 1877. *Held*, that the action was not barred by the statute of limitations; that the certification did not make the check due without demand; that the payment upon the forged indorsement discharged no part of defendant's indebtedness; that plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account, and when it discovered the mistake, had the right to repudiate the charge, return the check and claim payment. *B'k British N. Am. v. Mer. Nat. B'k.* 106

3. One who has sold, as genuine, a forged note cannot avoid his liability to refund the purchase-money, because of delay in detecting the forgery; no mere lapse of time, however long, can confirm his title to the money, if the vendee exercise reasonable diligence in giving notice of the discovery of the forgery. *Frank v. Lanier.* 112

4. In an action upon a promissory note, given February 21, 1871, for \$1,000, by D., defendant's testator, to the firm of M. Bros., plaintiff gave evidence tending to show that the consideration of the note was an agreement on the part of said firm to take up and suspend prosecution, for three months, upon a note, held by them, against one G. M., who had shortly before become an involuntary bankrupt, and was then being prosecuted by some of his creditors. *Held*, that these facts furnished a good consideration for the note in suit. *Melzer v. Doll.* 365

5. Defendants put in evidence a deposition, made before a register in bankruptcy, to prove a debt, in bankruptcy, against G. M. The deposition was to the effect that on March 13, 1871, before the register, came J. M. and G. M., of the firm of M. Bros., and made oath that the person against whom the petition in bankruptcy had been filed was before such filing and still is "indebted to this deponent," upon a promissory note of \$1,000, given for money loaned, and that for said sum deponent had not "had or received any manner of satisfaction or security whatever." The deposition was signed by J. M. alone, and was certified by the register to have been resworn to June 5, 1871. A copy of the note was attached, which corresponded with the note, to extend and secure which the note in suit was alleged to have been given. Defendant thereupon asked to have the complaint dismissed on the ground of failure of consideration, as the note of G. M. was proved in bankruptcy within the three months. The motion was denied. *Held* no error. *First*, it was not conclusive that the two notes were identical; that no estoppel was worked as against the firm by the fact that a member thereof proved, as his own debt, a note once held by the firm. *Second*, it would seem, from the fact that the deposition was resworn to, after the expiration of the three months, the former verification was defective, and no valid proceedings were in-

stituted within the three months. *Third*, that proof of the debt in bankruptcy would not have been such a proceeding as would have been a breach of the agreement to forbear. *Id.*

6. Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note, *held*, that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy. *Adams v. Adams.*

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BILL OF LADING.

— *Liability of carrier under.*
See Bank of Oswego v. Doyle.

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BOARD OF SUPERVISORS.

See SUPERVISORS (BOARD OF)

BOND.

1. An official bond given by B., upon his appointment as cashier of a bank, was conditioned "that he shall honestly and faithfully discharge the duties of such cashier, rendering at all times his undivided care and services to said bank, and shall obey the orders and directions of the president and directors of said bank lawfully given, and shall at all times account for and pay over all moneys * * * belonging to said bank, and shall keep true and accurate books," etc. The complaint in an action upon the bond, after averring specifically non-performance of each and all of the conditions alleged, that on the contrary thereof B. paid out the moneys of the bank fraudulently to various persons without any sufficient vouchers or security therefor, and fraudulently permitted various persons to overdraw their accounts without any se-

curity, and fraudulently altered and falsified the accounts and books of the bank so as to conceal such frauds, and has refused to pay over to the president and directors large sums of money, to-wit: \$100,000. *Held*, that these allegations were a sufficient compliance with the provision of the Revised Statutes (2 R. S. 378, § 5), providing that in an action for the breach of a condition of a bond, other than for the payment of money, the "declaration shall assign the specific breaches for which the action is brought;" also that if insufficient no reason was thereby furnished for a dismissal of the complaint, as defendant could have applied by motion to have them made more definite and certain, or for a bill of particulars. *Bostwick v. Van Voorhis.*

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2. The action was brought by the receiver of the bank who produced the bond. It appeared that B. was chosen cashier by resolution of the board of directors, passed January 17, 1869, and at the same time his bond was fixed at \$30,000, with sureties "to be approved by the board." The amount stated was that of the bond in suit, which was dated January 30, 1869; it was executed by B. and six sureties, three of whom, including defendant's testator, were directors of the bank, and was witnessed by the then teller of the bank, who on the same day proved its execution before a justice of the peace, who was also a director. B. thereupon entered upon the discharge of his duties and continued to act as cashier until January, 1877. No direct evidence was given that the bond was ever delivered to or that it was ever in possession of the bank, or that the sureties were formally approved. It appeared that in 1873, one of the sureties wrote to one of the directors expressing a wish no longer to be bondsman for B., and that this letter was produced and read at the next meeting of the board of directors. *Held*, that it was a fair and legal inference from the facts that the bond was at or about its date delivered to and accepted by

- the bank ; and that an express approval in writing was not necessary to make the bond binding. *Id.*
8. B. was teller of the bank before he was appointed cashier. It was claimed that before such appointment, the directors were aware of certain misconduct on his part as teller which they concealed from the sureties. The misconduct complained of did not affect the moral character or official fidelity of B. *Held*, that the objection was untenable ; that mere irregularities or omissions of duty, even if known to the directors, furnished no ground for a defense. *Id.*
 4. Before a bond in such a case can be avoided, fraud and bad faith, which has misled the surety to his damage, must be brought home to the obligee by clear and decisive evidence. *Id.*
 5. It appeared that the predecessor of B. in the office of cashier was also a defaulter. *Held*, that concealment of this fact from the sureties did not affect their liability as it in no way increased or related to the obligations assumed. *Id.*
 6. It was claimed that by the notice above referred to given by one of the sureties, of his desire to be released, he and the other sureties were relieved from liability for subsequent defaults by B. The notice was communicated to the board of directors November 8, 1873. It appeared that before the close of that month, the defalcation of B. amounted to more than the penalty of the bond. *Held*, that whatever might be the effect of such a notice, it could not operate immediately, but the bank had reasonable time, thereafter, to act, to notify the cashier and procure a new bond ; and, therefore, that the notice did not affect the liability of the sureties. *Id.*
 7. It was claimed that defendant's testator was released, because of misconduct and embezzlement of B. in 1874. It did not appear that the directors had any knowledge that the action of B. complained of was fraudulent or dishonest. *Held*, that the objection was untenable ; that if the directors were guilty of any negligence in not learning of the misconduct of B., defendant's testator, as one of them, was equally guilty with the others. *Id.*
 8. Under the provision of the Code of Civil Procedure (§ 1421), providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon. *Hessberg v. Riley.* 377
 9. Upon motion for such substitution the plaintiff may not be heard to object that notice of the motion was not served upon the officer who made the levy, as he does not represent that officer. *Id.*
 10. *It seems* that the motion being made for the benefit of the officer it is to be presumed that he has notice ; and, when he does not object, that he assents to the proceeding. *Id.*
 11. The effect of said provision is to make the obligors, when substituted, liable in place of the officer and the cause of action is thereupon against them. *Id.*
 12. The legislature has power to make such provision. *Id.*
 13. The said provision includes the liability of the officer for acts incidental to the levy and forming part of the transaction — for instance, the ejecting of the plaintiff from, and keeping him out of, the premises wherein the property was when levied upon. *Id.*

14. The amount claimed in such an action was \$2,000; the undertaking was for \$1,000. *Held*, that it was a matter in the discretion of the court below whether to require additional security and that the difference did not authorize a refusal of a motion to substitute the sureties. *Id.*

BROKER.

M. & Co., who were brokers and agents for H., having authority from her to pledge certain stocks belonging to her for a loan of \$35,000, made a contract with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for H., and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. In an action for an alleged conversion of the said stocks defendant claimed the right to hold the same as security for other loans made by it to M. & Co. *Held* untenable; that defendant had no right to assume that M. & Co. had authority to make other loans, at least, in the absence of any statement that the subsequent loans were made for the benefit of H., and this although M. & Co. had a power of attorney absolute on its face. *Talmage v. Third Nat. B'k.* 531

BURDEN OF PROOF.

1. A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in an action triable by the court, may "in the discretion of the court which reviews it, be disregarded, if it is of opinion, that substantial justice does not require that a new trial should be granted." (Code of Civil Procedure, § 1003.) *Post v. Mason.* 539
2. *It seems* that upon the trial of an indictment for an assault with a deadly weapon, the assault being proved, the burden is upon the accused to establish the existence of sufficient cause to justify the use of such a weapon. *Sawyer v. People.* 667

CALENDAR.

When a preference is claimed on the calendar of this court under the provision of the Code of Civil Procedure (§ 791, sub. 7), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party." (§ 793.) *B'k of Attica v. Met. Nat. B'k.* 239

CASES REVERSED, DISTINGUISHED, ETC.

- People v. Loomis* (4 Denio, 380), distinguished. *People v. Bork.* 18
- Coates v. First Nat. B'k* (15 J. & S. 312), reversed. *Coates v. First Nat. B'k.* 20
- Atty.-Genl. v. Conth. L. Ins. Co.* (71 N. Y. 325), distinguished. *Coates v. First Nat. B'k.* 26
- Prince v. Oriental B'k Corp'n* (L. R., 3 App. Cas. 325), distinguished. *Coates v. First Nat. B'k.* 30
- Clemence v. City of Auburn* (66 N. Y. 334), distinguished. *Urquhart v. City of Ogdensburg.* 73
- Elwood v. Deifendorf* (5 Barb. 398), distinguished. *Corn. Ex. B'k v. Nassau B'k.* 80
- Thompson v. Taylor* (72 N. Y. 32), distinguished. *Corn. Ex. B'k v. Nassau B'k.* 80
- Delaware Bank v. Jarvis* (20 id. 226), distinguished. *Corn. Ex. B'k v. Nassau B'k.* 80
- Lowndes v. Dickerson* (34 Barb. 596), questioned and distinguished. *Robins v. Ackertly.* 105
- Winchell v. Hicks* (18 N. Y. 558), distinguished. *Littlefield v. Littlefield.* 206

- First Nat. B'k v. Ballou* (49 N. Y. 155), distinguished. *Littlefield v. Littlefield*. 206
- Bruckett v. Harvey* (35 Hun. 502), reversed. *Bruckett v. Harvey*. 214
- People, ex rel. Ryan, v. French* (24 Hun. 263), reversed. *People, ex rel. Ryan, v. French*. 265
- Davis v. Davis* (75 N. Y. 221), distinguished. *Ramsden v. Ramsden*. 283
- Turrel v. Turrel* (3 Johns. Ch. 891), distinguished. *Ramsden v. Ramsden*. 284
- In re Hancock* (37 Hun. 78), reversed. *In re Hancock*. 284
- Bradley v. Mirick* (25 Hun. 272), reversed. *Bradley v. Mirick*. 293
- Story v. Furman* (25 N. Y. 214), distinguished. *Furnsworth v. Wood*. 318
- Birtwhistle v. Vardill* (11 Eng. Com. Law, 266; 2 C. & F. 581; 7 id. 895), distinguished. *Miller v. Miller*. 321
- Smith v. Derr* (34 Penn. St. 126), distinguished. *Miller v. Miller*. 323
- Lingen v. Lingen* (45 Ala. 410), disapproved. *Miller v. Miller*. 323
- Slater v. Jewett* (85 N. Y. 61), distinguished. *Sheehan v. N. Y. C., etc.* 335
- Buck v. Remsen* (84 N. Y. 388), limited. *Fowler v. Haynes*. 352
- Vanderbilt v. Schreyer* (31 Hun. 587), reversed. *Vanderbilt v. Schreyer*. 392
- Smith v. McCluskey* (45 Barb. 610), questioned in part. *Youmans v. Edgerton*. 411
- Terry v. Wiggins* (47 N. Y. 512), distinguished. *Campbell v. Beaumont*. 468
- Smith v. Bell* (6 Peters, 68), distinguished and questioned. *Campbell v. Beaumont*. 468
- Tomnole v. Hall* (4 N. Y. 140), distinguished. *In re O'Neil*. 520
- Hagadorn v. Raus* (72 N. Y. 586), distinguished. *Talmage v. Third Nat. B'k*. 539
- Casey v. Adams* (122 U. S. 66), distinguished. *Talmage v. Third Nat. B'k*. 539
- Segrave v. Kirwan* (1 Beatty, 157), distinguished. *Post v. Mason*. 550
- P. P. & O. I. R. R. Co. v. Williamson* (24 Hun. 216), reversed. *P. P. & O. I. R. R. Co. v. Williamson*. 552
- Lupton v. Lupton* (2 Johns. Ch. 614), distinguished. *Scott v. Stebbins*. 611
- People, ex rel. Davis, v. Cowles* (13 N. Y. 350), distinguished. *People, ex rel. Woods, v. Orissey*. 635
- Pinney v. Orth* (88 N. Y. 451), distinguished. *Kochler v. Adler*. 658
- Blossom v. Estes* (84 N. Y. 615), distinguished. *Catlin v. Ricketts*. 668

CAUSE OF ACTION.

1. Where power is conferred upon a municipal corporation to make local improvements, its exercise is quasi judicial or discretionary, and for a failure to act or an erroneous estimate of the public needs, a civil action cannot be maintained against it. *Urquhart v. City of Ogdensburg*. 67
2. An action by a wife against her husband for maintenance and support simply is not maintainable under the Code of Civil Procedure; the provision of said Code (§ 1766) authorizing a judgment, making provision for maintenance and support without a judgment of separation, applies only where the action is for a separation. *Ramsden v. Ramsden*. 281
3. S. and K. entered into a contract for the sale by the former, and purchase by the latter, of certain premises, the purchase-price to be paid by installments; S. to convey, "by good and sufficient deed,"

when all the purchase-money was paid. K. entered into possession under the contract; S. assigned the contract for full value to E., defendant's testator; K. assented thereto, and after making a payment upon the contract to E., assigned his interest therein to H., who paid the balance and then demanded of E. a deed or re-payment of the moneys paid. The title to the land was not in fact in S., and he, when the last payment was made, was insolvent. *Held* (EARL, J., dissenting), that in the absence of any proof of fraud or bad faith, an action was not maintainable against E. to recover back the money paid; that the assignment to E. transferred no title to the land and imposed upon him no obligation; that the money he received was actually due to him, and that there could be no obligation to refund it; that plaintiff's remedy was by action against S. *Youmans v. Edgerton.* 408

4. A devisee cannot maintain an action to have a mortgage upon the lands devised, executed by his testator to secure a usurious loan, canceled because of the usury, without first paying, or offering to pay, the sum actually loaned; he is not a "borrower" within the meaning of the provisions of the usury laws (1 R. S. 772, § 8; § 4, chap. 480, Laws of 1887), declaring such payment or offer to be unnecessary as a condition of granting relief where suit is brought by the borrower. *Buckingham v. Corning.* 525

5. *It seems* that where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors. *Harpending v. Munson.* 650

6. *It seems*, also, that where a director owning bonds of the company becomes the purchaser on foreclosure, an action cannot be maintained to impress a trust upon the property for the benefit of stockholders, because of fraudulent conduct on the part of the director in procuring the default which caused the foreclosure, at least without paying or offering to pay to him the amount of the bonds. The equity of the stockholders, if any, is only in the surplus after payment of the bonded debt, and the action would be in effect a bill to redeem. *Id.*

CERTIORARI.

1. The provision of the act of 1880 (§ 1, chap. 269, Laws of 1880) in regard to the review and correction of assessments by *certiorari* confers upon the court the power of review and correction, only when it appears by the return to the writ or the evidence taken thereunder, "that the assessment complained of is illegal, erroneous or unequal." It does not authorize a review where it appears that the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory upon the assessors. *People, ex rel. Twenty-third St. R. R. Co., v. Comm'rs of Taxes.* 598

2. Where, therefore, it appeared by the return to a writ of *certiorari* to review an assessment upon the personal property of the relator, which was alleged to be illegal because of the exemption contained in the act of 1880 (Chap. 543, Laws of 1880) that the assessment was made before May 1, 1880, in accordance with the then existing law, *held*, that the assessment was properly affirmed. *Id.*

CHATTEL MORTGAGE.

1. A chattel mortgage is not rendered void, as to creditors of the mortgagor, by a provision authorizing him to sell the mortgaged

property and apply the proceeds of sales toward the payment of the mortgage debt. *Brackett v. Harvey*. 214

2. Nor does an authority to the mortgagor to sell on credit, taking good business paper, which the mortgagee agrees to accept and apply on the debt, affect the validity of the mortgage. *Id.*

3. So also, permission to use a portion of the proceeds of sales to purchase other property does not vitiate the mortgage, where it is coupled with a condition that the property so purchased shall be brought in and subjected to the mortgage lien by a renewal of the mortgage. *Id.*

4. But an agreement, although outside of the mortgage and oral simply, that the mortgagor may use a portion of the proceeds of sales for his own benefit, avoids the mortgage. *Id.*

5. Such an agreement, however, must be proved; a mere expectation of one of the parties is not sufficient; it must appear that it had the conscious, concurrent assent of both. *Id.*

6. In an action by an assignee in bankruptcy to set aside certain chattel mortgages executed by the bankrupt, it appeared that the mortgagor had authority to sell on credit, taking business paper, which the mortgagee agreed to accept as payment, also that the former had permission to invest a portion of the proceeds of sales in the purchase of other property, in which case renewal mortgages were to be given, covering such purchases. Payments were made from time to time, and renewal mortgages were given. It was claimed by plaintiff that sales were made of the mortgaged property by the mortgagor to an amount more than sufficient to pay the mortgage debt, and that as against creditors it was to be considered as paid. One of the renewal mortgages was given after the alleged sales. It did not appear that any

of the creditors represented by plaintiff were creditors at the time said mortgage was given. *Held*, that, as it did not appear that any adverse lien upon or right affecting the property existed at the time, it was competent for the parties to the mortgage to deal with each other in accordance with the actual condition of the indebtedness; and although sales had been made, the proceeds whereof were not applied, it was immaterial. *Id.*

7. The doctrine of an agency in such case and of constructive payment simply applies in favor of a lien adverse to the mortgage, and may not be invoked where no such lien exists. As between the original parties the debt and security remain until actually paid. *Id.*

8. Two other renewal mortgages were executed within two months prior to the filing of the petition in bankruptcy. *Held*, that as said mortgages were given in performance of the original contract, which ante-dated the two months, and as, therefore, the mortgagee had an equitable right to compel their execution, they were not unlawful preferences within the meaning of the Bankrupt Act, but were valid; and this, although taken with knowledge on the part of the mortgagee that the mortgagor was insolvent, in the absence of evidence that he knew that they were executed in fraud of the provisions of the Bankrupt Act. *Id.*

9. But *held*, that this contract right to a lien upon newly-acquired property was confined to such as was purchased with the avails of property originally mortgaged, and if any of the property covered by the last two mortgages was not included in the prior mortgages and was not paid for out of such avails, as to such portion the mortgages were within the prohibition of said act. *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

In an action to recover the possession of personal property, defendant

claimed under a judgment against plaintiffs' assignor, and execution thereon levied on the property, alleging that the transfer to plaintiffs was fraudulent and void as to creditors. The property was taken and delivered to plaintiffs. Defendant succeeded in his defense. The value of the property as found was more than enough to pay the execution and officer's fees. *Held*, that judgment for the full value of the property in case a return thereof could not be had was erroneous; that the recovery, inasmuch as the transfer was valid as between the parties thereto, and so plaintiffs occupied the position of general owner, should have been limited to the amount of defendant's lien. *Fowler v. Haynes*. 346

CODE OF PROCEDURE.

§ 64. <i>Fowler v. Haynes</i> .	346
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CODE OF CIVIL PROCEDURE.

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§ 1268. <i>Blumenthal v. Anderson</i>	171
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CODE OF CRIMINAL PROCEDURE.

§§ 147, 188, 200, 395, 527. <i>People v. McGloin</i> .	241
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COMMON CARRIER.

Plaintiff and the firm of C. A. & Co., of which firm defendant C.A.

was a member, entered into an agreement by which the former agreed to advance money to purchase a cargo of wheat at Toledo, Ohio, the same to be consigned to plaintiff at Oswego, and held by it as security for the advances. In pursuance of the agreement the wheat was purchased and shipped on board a schooner, of which defendants were joint owners. The bill of lading provided for the delivery of the wheat to plaintiff, and was indorsed over and delivered to it on payment by it for C. A. & Co. of a draft drawn upon and accepted by that firm. On arrival of the schooner at Oswego, C. A. reported it to plaintiff's cashier, who consented that the wheat might remain on board the vessel. Of this arrangement the defendants, other than C. A., had no knowledge. A portion of the cargo was sold and delivered on orders of plaintiff; the balance was removed and disposed of without its consent or knowledge by C. A. & Co. In an action to recover the value of the balance so taken, *held*, that defendants were liable; that conceding their liability as common carriers had ceased, as to which *quære*, before the wheat in question was removed, they were liable as warehousemen. *B'k of Oswego v. Doyle*. 32

CONDITIONS.

Where the contract of a surety is not an absolute guaranty of payment of a debt of his principal, but simply an undertaking of such a nature that proceedings must be taken against the debtor before the obligation of the surety to pay arises, the law implies a condition on the part of the creditor that due diligence shall be used in proceeding against the principal; and to establish a defense based on a breach of this condition, it is not necessary for the surety to show a request on his part to the creditor to proceed, and damage resulting to him from a failure to comply. *Toles v. Adee*. 562

CONFLICT OF LAWS.

1. Defendant, who resided in Illinois, having collected certain moneys belonging to S., a resident of this State, by an agreement with the latter sent to him by mail, in place of the money, his (defendant's) notes for the amounts, dated at his place of residence in Illinois, payable with ten per cent interest, which rate of interest was lawful in that State. In an action upon the notes wherein the defense of usury was pleaded, *held*, that their validity was to be determined by the law of Illinois, and as they were valid there they were valid here; and this although one of the notes was made payable in this State. *Sheldon v. Haatun*. 124
2. Defendant was formerly a resident of this State. When here he borrowed of S. \$1,500, giving his note therefor, executed here but dated at a place in Illinois, payable with ten per cent interest. After the defendant had become a resident of Illinois S. sent the note, which was then past due, to him by mail, requesting a new note for the balance of principal unpaid, this defendant sent by mail, the new note being dated in Illinois, payable one year from date, with ten per cent interest. *Held* (ANDREWS, Ch. J., and MILLER, J., dissenting), that although the original note was usurious and void, yet, in the absence of any evidence of an intent to evade the usury laws of this State, the new note was to be regarded as an Illinois contract; that the surrender of the old note was a good consideration therefor, and that it was valid. *Id.*
3. When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller*. 815
4. As to whether the general rule of

law that a marriage, valid or void by the *lex loci*, is valid or void everywhere, applies to the case of a domiciled citizen of this State, who, while temporarily sojourning in another country, contracts a marriage there, valid under our laws, but invalid by the law of the place, *quære*. *Hynes v. McDermott*. 451

CONSIDERATION.

Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note, *held*, that it was given for a good consideration and was valid. *Adams v. Adams*. 381

— *Insufficiency of, to sustain guaranty of payment by due foreclosure and sale, in assignment of mortgage.*
See Vanderbilt v. Schreyer. 392

CONSTITUTIONAL LAW.

1. *It seems* that although the fee of a city street is in the city, an abutting owner is entitled to use it; and the legislature cannot devote it to purposes inconsistent with street purposes without compensation to such owner. *Mahady v. Bushwick R. R. Co.* 148
 2. The legislature had power to enact the provision of the Code of Civil Procedure (§ 1421) providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant. *Hessberg v. Riley*. 377
- *The act of 1881 (Chap. 70, Laws of 1881) amending charter of city of Troy, constitutional.*
See People, ex rel., v. Crissey. 616

CONSTRUCTION.

— *Rules applicable to the construction of statutes, stated.*

People, ex rel., v. Davenport. 574

CONTEMPT.

1. Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code, §§ 2554, 2555. *In re Dissoway.* 235

2. Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree. *Held*, that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (§ 8347, subd. 11). *Id.*

CONTRACTS.

1. Two contracts, purporting to have been made by the parties, recited that said parties had caused their corporate seals to be fixed and their corporate names thereto "subscribed respectively by their proper officers." To each contract was in fact attached the corporate seal and the proper signature of each party; the plaintiff's by a director, the defendant's by its president. In an action upon the contracts evidence was given tending to show that defendant's seal was affixed by its president in the exercise of lawful authority. *Held*, that the evidence was sufficient *prima facie* to establish that the contract was so executed as to bind both parties. *N. E. Iron Co. v. Gilbert (Met.) E. R. R. Co.* 153

2. By the provisions of one of the contracts plaintiff, in consideration of the covenants therein set forth on the part of the defendant, agreed to furnish the materials and to erect on masonry to be furnished by defendant, an elevated iron railway, in New York city, conforming in all particulars to plans and specifications approved by engineers named, a copy of which specifications it was declared was annexed to the contract. Plaintiff agreed to commence erecting the railroad at such point on the route as might be named by defendant's president, and to commence work preparatory to such erection as soon as that officer should notify it that defendant's capital stock was subscribed, and thirty per cent thereof paid into the treasury. Defendant agreed to designate the order in which the work should be commenced and completed, and to pay therefor a specified price per mile in monthly payments for the work done the preceding month. Plaintiff was not required to prosecute the work any faster than money to pay therefor should be furnished by defendant. Defendant subsequently, without giving plaintiff the prescribed notice, entered into a contract with another corporation for the construction of the work. *Held*, that although defendant did not, in express terms, undertake to do the act or give the notice required to set the plaintiff in motion, a promise to do so, or at least a promise that plaintiff should have the building of the railway in case that enterprise was prosecuted by defendant, was implied. *Id.*

3. No copy of the plans or specifications was annexed to the contract. Papers of that character, however, were produced in evidence bearing the signatures of the engineers named, which plaintiff's evidence tended to show were the ones referred to. *Held*, that the annexation of the copy of the specifications was not a condition on which the validity of the contract depended; that the originals, so far as referred to in the contract, became constructively a part of it; and

- therefore that the failure to annex the copy was immaterial. *Id.*
4. Provision was made in the contract for subletting all or any part of the work, but it was declared that such subletting should not release plaintiff from its obligations, and that the sub-contractors should be regarded as plaintiff's agents. After the same was executed, and before defendant entered into the new contract, plaintiff became insolvent and assigned all of its property to trustees for the benefit of creditors, the trustees having power to make such arrangement and disposition of the company's contracts as they should deem judicious. The assignment, after providing for payment of all of plaintiff's debts, directed the trustees to pay over any surplus to its treasurer. Plaintiff had expended, before the assignment, several thousand dollars in necessary preparation for executing it. The trustees held the shops and machinery transferred, in order that plaintiff might resort to them to execute the contract, and plaintiff's ability so to do, notwithstanding its embarrassment, was established. The trustees settled all claims against the plaintiff and re-assigned the contracts to it before defendant entered into the new contract, and the latter was frequently notified of plaintiff's readiness and willingness to perform. *Held*, that the insolvency and assignment did not justify defendant in treating the contract as abrogated, or give cause for rescinding it, and did not discharge that company from its obligations; that the contract was assignable, but conceding it was not, then it was not embraced in the trust deed. *Id.*
 5. A contract can be rescinded only by the acts or assent of both parties. *Id.*
 6. Plaintiff is a Massachusetts corporation. After the execution of the assignment it filed certificates in the office of the secretary of that State, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation; being wholly insolvent." The court decided these certificates to be conclusive against plaintiff. *Held* error; that, while they were proper evidence, they were not conclusive in an action such as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform. *Id.*
 7. Where a registered policy life insurance company which has entered into a contract with a general agent for his services for a specified term at a stipulated salary, before any breach of the contract on its part, is restrained from further prosecuting its business or exercising its corporate franchises by order of the court, and a receiver of its assets is appointed in proceedings under the insurance law (§ 7, chap. 902, Laws of 1869), the agent has no valid claim upon the fund in the hands of the receiver for damages for alleged breach of the contract, because of the discontinuance of the employment; at least, in the absence of evidence that it was some fault of the company which induced the superintendent of the insurance department to make the certificate upon which the attorney-general acted. There is, in such case, no breach on the part of the company, as performance is prevented, and the contract dissolved by the action of the State. *People v. Globe Mut. L. Ins. Co.* 174
 8. Where the contract of a surety is not an absolute guaranty of payment of a debt of his principal, but simply an undertaking of such a nature that proceedings must be taken against the debtor before the obligation of the surety to pay arises, the law implies a condition on the part of the creditor that due diligence shall be used in proceeding against the principal; and to establish a defense based on a breach of this condition, it is not necessary for the surety to show a

request, on his part, to the creditor to proceed, and damage resulting to him from a failure to comply. *Toles v. Ades.* 563

See COVENANTS.
GUARANTY.
INSURANCE (FIRE).
INSURANCE (LIFE).
LEASE.
MORTGAGE.
WARRANTY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

1. M. & Co., who were brokers and agents for H., having authority from her to pledge certain stocks belonging to her for a loan of \$35,000, made a contract with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for H., and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. In an action for an alleged conversion of the said stocks defendant claimed the right to hold the same as security for other loans made by it to M. & Co. *Held* untenable; that defendant had no right to assume that M. & Co. had authority to make other loans, at least, in the absence of any statement that the subsequent loans were made for the benefit of H., and this although M. & Co. had a power of attorney absolute on its face. *Talmage v. Third Nat. B'k.* 531

2. Plaintiff tendered, before suit was brought, the \$35,000 and interest, and on this being refused tendered \$46,000. *Held*, that this was not conclusive as an admission that defendant had a lien for the latter sum; and that defendant was not entitled to a deduction of that amount from the value of the stocks, but only of the amount of its lien. *Id.*

CORPORATIONS.

1. Under the provision of the Revised Statutes (1 R. S. 603, § 5), authorizing any person who "may be aggrieved by or may complain of any election" of directors of a corporation to make application to the Supreme Court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain may institute the proceedings. *In re Syr. C. & N. Y. R. R. Co.* 1

2. Where, therefore, an application was made under said provision, for a new election, by one who was not a stockholder at the time of the election complained of, but who subsequently received a certificate of stock from one who took part therein; *held*, that the petitioner did not occupy a position authorizing the interposition of the court in his behalf; that even if it be true, as to which *quære*, that an illegal election must be complained of and set aside, in order to enable the court to compel an election, when the officers of the corporation omit to call a meeting of stockholders to elect a new board of directors, the complaint may only be entertained; when made by some aggrieved party who is not himself the author of the wrong complained of. *Id.*

3. Two contracts, purporting to have been made by the parties, recited that said parties had caused their corporate seals to be fixed and their corporate names thereto "subscribed respectively by their proper officers." To each contract was in fact attached the corporate seal and the proper signature of each party, the plaintiff's by a director, the defendant's by its president. In an action upon the contracts evidence was given tending to show that defendant's seal was affixed by its president in the exercise of lawful authority. *Held*, that the evidence was sufficient *prima facie* to establish that the contract was so executed as to bind both parties. *N. E. Iron Co. v. Gilbert (Met.) Et. R. R. Co.* 153

4. Plaintiff is a Massachusetts corporation. After the execution of the contract it became insolvent and executed an assignment for the benefit of creditors; it filed certificates in the office of the secretary of that State, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation, being wholly insolvent." The court decided these certificates to be conclusive against plaintiff. *Held* error; that, while they were proper evidence, they were not conclusive in an action such as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform. *Id.*
 5. Where a dividend upon its stock is declared by a corporation it belongs to the holders of the stock at the time of the declaration, without regard to the source from which, or the time during which, the funds divided were acquired by the corporation. *Jermain v. L. S. & M. S. R. Co.* 483
 6. In 1857 the M. S. & N. I. R. R. Co., to whose rights and obligations defendant succeeded, issued certain preferred and guaranteed stock, the same being entitled to annual dividends of ten per cent, payable out of the net earnings of the company, and also to share *pro rata* with the common stock in any surplus. No dividends were paid upon said stock until 1863. Subsequently dividends were regularly declared and paid thereon at the rate specified, and dividends were declared and paid upon the common stock. The arrears of dividends on the preferred stock were not paid, and no dividend has been declared or funds set apart by defendant to pay the same. In 1870 forty shares of said preferred stock were purchased by and transferred to plaintiff, and defendant issued to him a certificate therefor. In an action to compel defendant to declare and pay the dividends in arrears, *held*, that the guaranty related to and was an incident of the stock and passed with it upon assignment thereof; that although the guaranteed dividends became due in 1864, and payment thereof could have been enforced by the holder of the stock, yet as no part of the net earnings was set apart to pay the same, but, on the contrary, they were otherwise appropriated, the dividends remained payable to the holder, and an assignment of the stock carried with it the right to receive and recover said dividends; and that, therefore, plaintiff was entitled to maintain the action. *Id.*
 7. The provision of the act to "provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations" (§ 8, chap. 542, Laws of 1880), exempting from assessment and taxation, save as provided for in the act, the capital stock and personal property of the corporations, companies and associations specified, applies only to State taxation; it does not affect the right of municipal authorities to assess and tax such property for local purposes. *People, ex rel. W. F. Ins. Co., v. Davenport.* 574
- The act (Chap. 542, Laws of 1880) providing for taxation of corporations did not affect the assessment and collection of taxes in New York city for 1880.
- See People, ex rel. v. Comm'rs.* 593
- See* INSURANCE (FIRE).
 INSURANCE (LIFE).
 MANUFACTURING CORPORATIONS.
 MUNICIPAL CORPORATIONS.
 RAILROAD CORPORATIONS.
- COSTS.
1. Where, in an action brought by the attorney-general against an insolvent life insurance company, after the entry of judgment dissolving the corporation and appointing a receiver of its assets, certain of the policy-holders were allowed to intervene, who appeared by attorneys and contested the al-

lowance of commissions, claimed by the receiver, which were materially reduced, *held*, that the court had no power to make an allowance to the intervenors out of the funds in the hands of the receiver for their disbursements and counsel fees, as they were simply individual parties protecting their own interests. *Att'y-Gen'l v. N. Am. L. Ins. Co.* 57

2. The cases where such allowances have been made to trustees, or to one or more of several persons interested in a common fund who have brought suit to protect or recover the fund, distinguished. *Id.*

8. In an action against creditors costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer. *Held*, the defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (§ 1836). *Meltzer v. Doll.* 865

4. In an action brought by plaintiff as creditor of a manufacturing corporation, on behalf of himself and other creditors, against the stockholders, to enforce the liability imposed by the General Manufacturing Act (§ 12, chap. 40, Laws of 1848) upon stockholders, a judgment was entered authorizing and directing the county treasurer to docket judgments against the stockholders for the maximum amount of their possible liability, and to collect thereon, by execution, enough to pay the claims of creditors, as proved, and their costs, and out of the payments to him to retain his lawful commissions, and distribute the residue to those entitled. The commissions of the county treasurer were stated in plaintiff's bill of costs, and taxed as an item of disbursements. *Held* error; that the county treasurer was authorized in issuing executions, for the purpose of providing enough to pay creditors, to include his commissions and they were not properly charge-

able as plaintiff's disbursements. *Veeder v. Judson.* 374

5. Certain of the papers in the case were printed upon the request of the attorneys for some of the defendants and by direction of the referee, the expense was taxed as an item of disbursements. *Held* error. *Id.*

6. The repeal by the act of 1880 (Chap. 245, Laws of 1880) of the act of 1870 (Chap. 359, Laws of 1870) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the repealing act took effect. *In re Estate of Weston.* 502

7. In proceedings so pending *held*, that the surrogate could not exceed the maximum amount limited by the Code of Procedure (§ 309); also that, although the costs were taxed after the Code of Civil Procedure without effect, they were not affected by its provisions, as by it (§ 8347, subd. 11) the provisions of the chapter (18); in reference to Surrogates' Courts, are with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880. *Id.*

— *When title to land, not brought in question by pleadings in action, for assault and battery, so as to entitle plaintiff to full costs where judgment is less than \$50.*

See Langdon v. Guy. (Mem.) 660

COUNTY TREASURER.

— *In action against stockholders of a manufacturing corporation to enforce liability to creditor, the county treasurer was directed to docket judgments against defendants for maximum liability and to collect by execution enough to pay claims of creditors, with costs, and out of proceeds to retain his lawful commissions. Held, that said commissions were not tax-*

able as an item of plaintiff's disbursements.

See Veeder v. Judson. 874

COURTS.

See COURT OF APPEALS.
JUSTICE'S COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

1. When a preference is claimed on the calendar of this court under the provision of the Code of Civil Procedure (§ 791, subd. 7), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party" (§ 798).
B'k of Attica v. Met. Nat. B'k. 239
2. It is no excuse for a failure to procure the order that there was no term of the court at which a motion for the order could be made. Such a motion may be made on notice before any judge of the court, at his residence or office, or at any place which the judge, on application of the moving party, may name. *Id.*

COVENANTS.

- A covenant in a mortgage, to keep buildings on the mortgaged premises insured for the benefit of the mortgagee, is not a covenant running with the land, but is entirely personal in its character. *Reid v. McCrum.* 412

CRIMINAL TRIAL.

1. Where the doing of any one of several things constitutes an indictable offense an indictment may in a single count group them together and charge the accused with

having committed them all, and a conviction may be had on proof of the commission of any one of the acts charged, without proof as to the others. *Bork v. People.* 5

2. The act of 1875 (Chap. 19, Laws of 1875), "to provide more effectually for the punishment of peculation and other wrongs affecting public moneys, and rights of property," applies as well to cases where the offender is an officer, agent or servant, having the custody of funds or property charged to have been misappropriated, or owing a special duty in relation thereto, as to a private individual having no official or confidential relation to the State or municipality defrauded. *Id.*
3. On the trial of an indictment under said act, it appeared that the prisoner who was treasurer of the city of Buffalo, as such, received for sale, in accordance with the usual custom, certain negotiable bonds of the city which the common council had authorized to be issued and sold for city purposes; these he put into the hands of a broker with directions to sell and credit the proceeds to a firm of which the prisoner was a member, which was done. Said firm was at the time indebted to the broker in a sum exceeding the sum realized from the sale of the bonds. No entry of the sale was made in any manner in the treasurer's books. The indictment charged that the accused "feloniously, wickedly and wrongfully did obtain and receive * * * and convert" to his own use said bonds. *Held*, that the transaction was a conversion of the bonds, and, assuming that the prisoner did not wrongfully receive or obtain them, his wrongful conversion thereof was sufficient to sustain a conviction. *Id.*
4. Upon the trial of an indictment for murder in the first degree, the evidence upon the part of the prosecution was to the effect that the prisoner, an Italian, married a young Italian girl and with her lived for a time with her parents.

He did not live harmoniously with his wife and had some difficulty with his mother-in-law. He entered the room where his wife and her parents were with a friend for the purpose of procuring a paper in his charge belonging to the latter. His wife was hanging clothes out of a window; he asked her to go into a bed-room and bring out a box containing the paper. She replied that she was hanging out clothes, and that he should go and get the box for himself. He took her by the arm and led her into the bed-room, saying, "Will you go or will I go." Immediately thereafter he shot and killed her, came out with the revolver in his hand with which the shooting had been done, and putting the weapon to the head of his mother-in-law he fired and killed her. The indictment was for the last killing. The revolver belonged to the prisoner and had been for some time in his possession. *Held*, that the testimony established that the killing was intentional, deliberate and premeditated. *People v. Majone*. 211

5. Upon the trial of an indictment for murder, a statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he (the officer) was an inspector of police, and had been watching him (the prisoner) since the shooting, and saw him, in company with a man named Healey, try to steal a barrel of whisky the night before, also told him about his pledging a pistol with which the murder was supposed to have been committed; the prisoner thereupon said he would make a statement, a coroner was sent for, who came to police headquarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk to take down and prove the confession. *Held*, that the evi-

dence did not disclose any threats, and did not authorize an inference that the confession was made under the influence of fear; that assuming the paper was sworn to by the accused it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Criminal Procedure (§ 395). *People v. McGloin*. 241

6. The provisions of said Code regulating the mode of taking and authenticating the statements of prisoners accused of a crime (§§ 188-200) refer only to the judicial examinations therein provided for, regularly instituted before a magistrate authorized to conduct such an examination (§ 147); they do not include a statement made in the manner of the one in question. *Id.*
7. It appeared that the deceased prior to his death lived with his family in rooms over a bar-room and restaurant kept by him; that being disturbed in the night time by a noise in the room below, he got up and started to go down stairs to ascertain its cause, and while upon the stairs was shot by some person standing in the door between the hall and bar-room at the foot of the stairs who was engaged in the commission of a burglary; that in the evening prior to the murder the prisoner redeemed a pistol which was in pawn, and took it away, which he again pawned the morning after the murder. The pistol was found through the admission contained in the confession, and the prisoner acknowledged that it was the pistol with which the deceased was shot. He also admitted to a witness that the morning after the murder he was on the street where the crime was committed the night before, and said "a man ain't a tough until he knocks his man out." *Held*, that there was sufficient evidence aside from the confession to meet the requirements of said provision authorizing proof of a confession, i. e., that to warrant a conviction "additional proof that the crime charged has been committed" shall be given. *Id.*

8. *It seems that upon the trial of an indictment for an assault with a deadly weapon, the assault being proved, the burden is upon the accused to establish the existence of sufficient cause to justify the use of such a weapon. Sawyer v. People.* 667

— *Evidence of character of prisoner as a peaceful man not competent on trial of indictment for assault with deadly weapon, evidence should be confined to general reputation and character.*

CUSTOM.

See USAGE.

DAMAGES.

1. The court, in an action for slander, charged in substance that if the jury found the alleged wrong to have been malicious and intentional, they could give exemplary damages, in determining which they might consider the injury to plaintiff's feelings and have respect to the force of example. *Held no error. Brooks v. Harrison.* 83
2. In an action by a vendee of personal property against his vendor for breach of warranty of title, express or implied, damages can only be recovered for actual loss. *O'Brien v. Jones.* 193

DEATH.

1. Under the provision of the act of 1870 (Chap. 78, Laws of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the inter-

est. Manning v. Pt. Henry Iron Ore Co. 664

2. *It seems that the remedy of the defendant in such case, if any, is to move to set aside the verdict.* *Id.*

DEFINITIONS.

1. Negotiable bonds of a municipal corporation, complete in form and capable of becoming effective instruments in the hands of a *bona fide* holder, are, although unissued, "property" within the meaning of the act (Chap 19, Laws of 1875), providing for the punishment of speculation of public moneys and property. *Bork v. People.* 5
2. There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with the direction; what is a reasonable time must depend upon the circumstances of each particular case. *In re Estate of Weston.* 503
3. *It seems that where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, i. e., eighteen months, may serve as a just standard.* *Id.*

— *A devise of lands mortgaged to secure loan to testator is not a "borrower" within the meaning of the usury laws.*

See Buckingham v. Corning. 525

DESCENT.

1. When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State, or country where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller.* 816

2. Plaintiff was born illegitimately in Wurtemberg, in 1845, where his parents then resided; they removed, with plaintiff, to the State of Pennsylvania, and his father there became a naturalized citizen. In 1853, while domiciled in said State, the parents were married. In 1857 a law was passed by the legislature of that State, legitimatizing children, born out of wedlock, of parents who shall thereafter marry, which act, by an act of 1858, was made applicable to all cases arising prior to 1857, save where some interest had become vested. In 1862 plaintiff removed, with his parents, to this State; his father thereafter became owner of certain real estate, and in 1875 died seized thereof, and intestate. In an action of ejectment *held*, that the provision of the Revised Statutes (1 R. S. 754, § 19) disinheriting illegitimate children, did not apply; and that plaintiff was entitled to inherit equally with the children of the deceased born in wedlock. *Id.*

DEVISE.

A devisee cannot maintain an action to have a mortgage upon the lands devised, executed by his testator to secure a usurious loan, canceled because of the usury, without first paying, or offering to pay, the sum actually loaned; he is not a "borrower" within the meaning of the provisions of the usury laws (1 R. S. 772, § 8; § 4, chap. 430, Laws of 1837), declaring such payment or offer to be unnecessary as a condition of granting relief where suit is brought by the borrower. *Buckingham v. Corning.* 525

ELECTION (OF OFFICERS).

1. Under the provision of the Revised Statutes (1 R. S. 603, § 5) authorizing any person who "may be aggrieved by or may complain of any election" of directors of a corporation to make application to the Supreme Court to compel a new election, only some person whose rights have been infringed

and who is justly entitled to complain may institute the proceedings. *In re Syr. C. & N. Y. R. R. Co.* 1

2. The legislature may provide for the manner in which the result of an election shall be determined and declared, and where the mode is so provided, until it is obeyed, the election is not complete and the candidate not qualified to serve. *People, ex rel. Woods, v. Crissey.* 616

3. At the general election held in November, 1881, M. & F. were candidates for the office of alderman in the city of Troy. Two of the inspectors of election made out and signed a statement certifying that F. had received a majority of the votes cast. The other two inspectors refused to sign the same. The incomplete statement was filed in the office of the city clerk, and F. took the oath of office. *Held*, that until the rights of the parties were tested in the courts and the result settled, the election was to be treated as a failure so far as either party sought to found a right upon it, and neither could claim any benefit therefrom; that the provision of the original charter of the city of Troy (§ 5, chap. 131, Laws of 1816), providing for the manner of electing aldermen, requiring inspectors of election by a written statement to certify and declare the result, and file their certificate in the office of the city clerk, has not been repealed or modified unless the general election law was applicable, and that makes the duties of inspector, in ascertaining and declaring the vote, even more specific; and that by such failure to elect, a vacancy was created. (§ 6, chap. 101, Laws of 1855.) *Id.*

4. At the time of said election, M. was an incumbent of the office, having been elected for a term from March, 1881, to the general election of that year, under the amendment of the city charter of 1880 (§ 7, chap. 30, Laws of 1880), which changed the date of the municipal election from March to

the day of the general election in November, and which provided for filling the short terms at the general election in 1880. *Held*, that as no successor to M. was "duly qualified," he held over under the provision of the city charter of 1870 (§ 6, title 6, chap. 598, Laws of 1870), declaring that "all persons elected or appointed under this act shall continue to hold their office until a successor is duly qualified"; that said provision applied to the office of alderman; that it was not inconsistent with the provisions of the amendatory act of 1880 in reference to the short term; and so it was not repealed by said act. *Id.*

5. F., who prior to the general election in November, 1881, had not sought to act as alderman, on the night before that election, resigned and at that election fifty-five votes were cast for him for alderman "to fill vacancy." No public notice of his resignation, or of any vacancy in the office, or of an election to fill such vacancy had been given, nor had the common council directed an election to fill a vacancy. At a special meeting of the common council held a week after the election under call of the mayor, "for the purpose of canvassing the votes for mayor and school commissioners," D. F., city clerk, read the resignation of F. and announced the votes cast for him to fill vacancy. The president declared F. to be elected, and entitled to qualify and take his seat; the oath of office was administered and filed, and F., against the remonstrances of some of the board, acted as alderman. *Held*, that the sole effect of the resignation was upon F. as a contestant, and was an abandonment of his claim; that the only mode of filling the vacancy was by order of the common council, directing an election and determining the time and place (§ 8, chap. 181, Laws of 1816; § 2, chap. 293, Laws of 1854; § 4, chap. 101, Laws of 1855); and that, therefore, F. was not elected. *Id.*

6. Immediately after the adjourn-

ment of said meeting of the common council, the new mayor, by order in writing, suspended D. F. from office, and then nominated and appointed O'B. city clerk *pro tem.*; by him the roll of new members was called; six old and seven newly-elected members answered to their names. The seven took the oath of office before O'B., who was a notary public, and filed their oaths in the office of the city clerk, and thereupon the thirteen, with M., fourteen constituting a quorum, proceeded to act as a board. K. was nominated and confirmed as city clerk. *Held*, that the meeting was lawful and lawfully constituted; that the action of the seven new aldermen, even if they did not legally take the oath of office, was valid; also that while the suspension of D. F. did not amount to a removal, the nomination or confirmation of K. had that effect; that the city clerk, having no fixed term of service, could be removed at pleasure by the proper appointment of a successor. *Id.*

7. The common council so constituted proceeded to elect two police commissioners; it was resolved that they be elected at one time and by one ballot, each voting for but one. Eight voted for M., six for C. By the rules of the common council, the assembly rules as laid down in Croswell's Manual are made controlling. *Held*, that conceding the provision of the charter of 1880, confining the vote of each alderman in the election of police commissioners to one of the two to be chosen for the same term, to be unconstitutional, it imposed no restraint and the aldermen must be deemed to have voluntarily voted as they did, and the failure to exercise their full rights did not affect the vote actually given; that as under the assembly rules, a quorum being had, a majority of all present voting for the specific office, was sufficient to elect, there being a quorum present, and the officer chosen in each case having received not only a majority of those voting to fill that office, but

all of those so voting was legally elected. *Id.*

8. The provision of said act of 1880 (§ 10), requiring that "the compensation or salary of any officer shall be fixed before his appointment," does not require the salary to be fixed before every new appointment; when once properly attached to the office it is sufficient. *Id.*

9. The power given by said act (§ 3) to the mayor, to suspend any appointed officer for misconduct or neglect, was simply incident to and depended upon the power of removal given to the common council, and was repealed, as to police commissioners, by the provision of the amendatory act of 1881 (§ 1, chap. 76, Laws of 1881), which gives to the Supreme Court exclusive jurisdiction and power to remove them. *Id.*

10. The said act of 1881 is not repugnant to the constitutional provision requiring (Art. 3, § 16) a local bill to embrace but one subject, and that to be expressed in the title. *Id.*

ELECTION (OF RIGHTS).

A policy of insurance against loss by fire or lightning, issued by defendant, contained this clause: "In case differences shall arise, touching any loss or damage, after proof thereof has been received, in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators." And it was provided that no suit upon the policy should be brought against the company until after an award, "fixing the amount of such claim, in the manner above provided." The policy gave to defendant the option, in case of loss, "to repair, rebuild, or replace the property." A loss having occurred, defendant, under this option clause, elected to repair and restore the building insured to its former condition, and, after doing some work, informed the insured that the repairs were finished. The insured, claiming the repairs to be

insufficient, made and served proofs of loss. Defendant orally requested the insured to arbitrate the question of damages, and after commencement of this action upon the policy, offered, in writing, to arbitrate; these offers were refused. *Held*, that the said refusal was not a defense; that defendant, having the right to determine the manner in which it would perform, and having elected to repair, this involved not only a rejection of the right to discharge its liability by the payment of damages, but also of those provisions of the contract having reference to that method of performance; that from the time of such election, the contract became simply an undertaking, on the part of the defendant, to restore the building insured to its former condition, and the measure of damages for a breach thereof did not necessarily depend upon the amount of damages inflicted by the peril insured against; and that, therefore, the provision as to arbitration was rendered inoperative by the election to repair. *Wynkoop v. N.Y. F. Ins. Co.* 478

EMBEZZLEMENT.

1. The act of 1875 (Chap. 19, Laws of 1875), "to provide more effectually for the punishment of speculation and other wrongs affecting public moneys, and rights of property," applies as well to cases where the offender is an officer, agent or servant, having the custody of funds or property charged to have been misappropriated, or owing a special duty in relation thereto, as to a private individual having no official or confidential relation to the State or municipality defrauded. *Bork v. People.* 5
2. The legislature has power to provide by an independent statute, like the one referred to, that certain acts of embezzlement, punishable by the existing law, shall constitute a distinct offense, and to affix a severer punishment than that provided by the general law for that class of offenses. *Id.*

3. In an indictment under said statute for the unlawful conversion of property, or funds belonging to a municipal corporation by an officer thereof, it is not necessary to aver the fiduciary character of the accused. *Id.*

4. This is a fact, however, proper to be proved on the trial. *Id.*

5. Negotiable bonds of a municipal corporation, complete in form and capable of becoming effective instruments in the hands of a *bona fide* holder are, although unissued, "property" within the meaning of said act. *Id.*

6. On the trial of an indictment under said act, it appeared that the prisoner, who was treasurer of the city of Buffalo, as such, received for sale, in accordance with the usual custom, certain negotiable bonds of the city, which the common council had authorized to be issued and sold for city purposes; these he put into the hands of a broker with directions to sell and credit the proceeds to a firm of which the prisoner was a member, which was done. Said firm was at the time indebted to the broker in a sum exceeding the sum realized from the sale of the bonds. No entry of the sale was made in any manner in the treasurer's books. The indictment charged that the accused "feloniously, wickedly and wrongfully did obtain and receive * * * and convert" to his own use said bonds. *Held*, that the transaction was a conversion of the bonds, and, assuming that the prisoner did not wrongfully receive or obtain them, his wrongful conversion thereof was sufficient to sustain a conviction. *Id.*

EMINENT DOMAIN.

1. *It seems* that although the fee of a city street is in the city, an abutting owner is entitled to use it; and neither the legislature nor the city can devote it to purposes inconsistent with street purposes without compensation to such

owner. *Mahady v. Bushwick R. Co.* 148

2. Lands once taken for a public use, pursuant to law, under the right of eminent domain, cannot, under general laws, and without special authority from the legislature, be appropriated, by proceedings *in invitum*, to a different public use. *P. & C. I. R. R. Co. v. Williamson.* 552

ESTOPPEL.

— *A firm not estopped by statements of one of its members in deposition, proving in bankruptcy, as his own a debt once owned by firm.*
See Meltzer v. Doll. 365

EVIDENCE.

1. Two contracts, purporting to have been made by the parties, recited that said parties had caused their corporate seals to be fixed and their corporate names thereto "subscribed respectively by their proper officers." To each contract was in fact attached the corporate seal and the proper signature of each party; the plaintiff's by a director, the defendant's by its president. In an action upon the contracts evidence was given tending to show that defendant's seal was affixed by its president in the exercise of lawful authority. *Held*, that the evidence was sufficient *prima facie* to establish that the contract was so executed as to bind both parties. *N. E. Iron Co. v. Gilbert (Met.) El. R. R. Co.* 153

2. Plaintiff is a Massachusetts corporation. After the execution of the contract it became insolvent and made an assignment for the benefit of creditors; it filed certificates in the office of the secretary of that State, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation, being wholly insolvent." The court decided these certificates to be conclusive against plaintiff.

Held error; that, while they were proper evidence, they were not conclusive in an action such as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform.

Id.

3. Upon the trial of an indictment for murder, a statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he (the officer) was an inspector of police, and had been watching him (the prisoner), since the shooting and saw him, in company with a man named Healey, try to steal a barrel of whisky the night before, also told him about his pledging a pistol with which the murder was supposed to have been committed; the prisoner thereupon said he would make a statement, a coroner was sent for, who came to police head-quarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk to take down and prove the confession. *Held*, that the evidence did not disclose any threats, and did not authorize an inference that the confession was made under the influence of fear; that assuming the paper was sworn to by the accused it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Criminal Procedure (§ 395). *People v. McGloin*. 241

4. It appeared that the deceased prior to his death lived with his family in rooms over a bar-room and restaurant kept by him; that being disturbed in the night time by a noise in the room below, he got up and started to go down stairs to ascertain its cause, and while upon the stairs was shot by some person standing in the door between the

hall and bar-room at the foot of the stairs who was engaged in the commission of a burglary; that in the evening prior to the murder the prisoner redeemed a pistol which was in pawn, and took it away, which he again pawned the morning after the murder. The pistol was found through the admission contained in the confession, and the prisoner acknowledged that it was the pistol with which the deceased was shot. He also admitted to a witness that the morning after the murder he was on the street where the crime was committed the night before, and said "a man ain't a tough until he knocks his man out." *Held*, that there was sufficient evidence aside from the confession to meet the requirements of said provision authorizing proof of a confession, *i. e.*, that to warrant a conviction "additional proof that the crime charged has been committed" shall be given.

Id.

5. The defendant appeared herein by attorney; issue was joined which was regularly brought on for trial on notice, and the defendant's attorney not appearing, the trial proceeded as upon default. B., the original plaintiff, was examined as a witness. The default was, on application of defendant, set aside and a new trial granted. Upon the second trial, the minutes of the testimony of B. given on the first trial, he having died in the mean time, were offered in evidence and rejected on the ground that defendant had no opportunity to cross-examine the witness. *Held* error; that the evidence was competent, both at common law and under the Code of Civil Procedure (§ 830); and that as defendant had the power to appear and cross-examine, his failure so to do was a waiver of that privilege. *Bradley v. Mirick*. 293

6. In an action to recover damages for injuries caused by falling into an uncovered area in the sidewalk in front of defendant's premises, he claimed that the premises were, at the time of the accident, leased to and in the possession of one L.

It was proved on the part of plaintiff that the purchases made by L. were charged to defendant. The latter, as a witness in his own behalf, was asked "why were the goods charged to you?" This was objected to and excluded. *Held* no error. *McGuire v. Spence*. 303

7. In an action upon a promissory note given February 21, 1871, for \$1,000, by D., defendant's testator, to the firm of M. Bros., plaintiff gave evidence tending to show that the consideration of the note was an agreement on the part of said firm to take up and suspend prosecution, for three months, upon a note, held by them against one G. M., who had shortly before become an involuntary bankrupt, and was then being prosecuted by some of his creditors. The defense was, among other things, that the note was merely an accommodation one. P. M., son of G. M., was called as a witness, by defendant, to prove that defense. Upon cross-examination plaintiff was permitted to prove, by him, under objection and exception, a bill of sale, executed to him in January, 1871, by his father, of four hundred tons of coal, and a chattel mortgage, executed by himself to D., purporting to cover the personal property, aside from the coal, formerly used by G. M. in carrying on the coal business, and on the premises occupied by him for that business. *Held* no error; that the evidence was proper, as showing an intent or motive and so as affecting the credibility of the witness; also as showing the relation of the parties; *i. e.*, that D. had such an interest in the pecuniary condition of G. M. as would naturally induce him to give his own note for the debt of the latter. *Meltzer v. Doll*. 365

— *Evidence of usage, when properly excluded.*

See C. E. B'k v. N. B'k. 74

— *Where facts showing intent are admissible as part of res gestae on question of merger.*

See Smith v. Roberts. 470

— *When in action on policy of insurance, evidence of experts as to value of work and materials requisite to put building in as good condition as before the loss, competent.*

See Wynkoop v. N. F. Ins. Co.

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— *When evidence of admissions and declarations of opposing witness, competent.*

See Homer v. Everett. (Mem.) 641

— *When evidence of party as to nature of transaction incompetent under section 829 of Code of Civil Procedure.*

See Koshler v. Adler. (Mem.) 657

— *Evidence of character of prisoner as a peaceful man not competent on trial of indictment for assault with deadly weapon, evidence should be confined to general reputation and character.*

See Sawyer v. People. (Mem.) 667

EXCEPTION.

As to whether the provision of the Code of Criminal Procedure (§ 527, as amended in 1882, chap. 360, Laws of 1882), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære*. *People v. McGloin*.

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EXECUTION.

Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code, §§ 2554, 2555. *In re Dissoway*: 235

— *A construction given to the provision of Code of Civil Procedure (§ 1431) providing when action is brought against officer to recover chat-*

tels levied on by execution or attachment, if bond of indemnity has been given him, that the obligors may be substituted as defendants, and its effect stated.

See Hessberg v. Riley.

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EXECUTORS AND ADMINISTRATORS.

1. In an action against an executor costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer. *Held*, that as defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (§ 1836). *Meltzer v. Doll.* 365

2. As incident to the duty imposed upon surrogates by the Code of Civil Procedure (§§ 2478, 2481, 2743), to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. *In re Verplanck.* 439

3. There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with the direction; what is a reasonable time must depend upon the circumstances of each particular case. *In re Weston.* 502

4. *It seems* that where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, i. e., eighteen months, may serve as a just standard. *Id.*

5. Among other assets left by a testator, which, by the will, his executors were directed to convert into money, was an interest in

certain real estate which was incumbered by mortgages. The executors failed to sell; they paid off the incumbrances and expended further sums of money for taxes, and in the care and preservation of the property. A large proportion of said expenditures were after the expiration of the eighteen months. In the executors' accounts the items of payment upon the mortgages were entered as debts allowed and paid in a statement of "moneys paid, * * * to the creditors of the deceased." Certain contestants, among whom were infants, who appeared by special guardian, filed specific objections to the accounts. No objection was stated to the payment of the mortgages. The accounts were sent to an auditor; after the close of the evidence before him, the adult contestants stated that they would not press any objections to the accounts, in respect to said property. The guardian for the infant contestants filed no exceptions to the auditor's report, the adult contestants did; the surrogate decided that the notice given the auditor was equivalent to a withdrawal of all objections as to said expenditures. *Held* no error. *Id.*

6. The adult contestants appealed, the special guardian did not. *Held*, the objection that the infants did not join in the notice, and so were not bound thereby, could not be urged upon the appeal; that the adult contestants were bound by their own action, and the infants by the decree which, as they had not appealed, was conclusive as to them. *Id.*

EXPERTS.

— *When, in action on policy of insurance, evidence of experts as to value of work and materials requisite to put buildings in as good condition as before the loss, competent.*

See Wynkoop v. N. F. Ins. Co. 478

FACTOR.

1. H., who was the consignee and

agent of a manufacturing corporation for the sale of its manufactures, under an agreement by which he was to make advances to the company on goods consigned, and reimburse himself out of proceeds of sales, sold certain of the goods to defendant in his own name, upon which he had made advances to more than their value. In an action to recover the purchase-price, defendants sought to set off an account against the company, which had become insolvent, for goods sold by them to it. *Held*, that defendants were not entitled to the set-off. *Young v. Thurber*. 388

2. After defendants had sold to the corporation a portion of the goods for which the set-off was claimed they requested H. to consent that the purchases of the company be charged to his account; this he refused, but stated that when defendants' account should fall due, he would accept the company's draft for the amount. *Held*, that this could not be construed as an agreement to allow the set-off; that it was simply a voluntary promise to accept, and if enforceable on the ground that goods were delivered on the faith of it, could be enforced only according to its terms, and as defendants never obtained or attempted to obtain such a draft, defendants had acquired no rights under it. *Id.*

FISH AND FISHERIES.

1. Certain letters patent executed by the colonial government of the Colony of New York, the first of which bears date November 30, 1666, granted to the freeholders of the town of H., Long Island, a tract of land described by metes and bounds, together with all "havens, harbors, * * * fishing," etc., within the specified limits. The north boundary is "the sound running betwixt Long Island and the maine." Within the east and west bounds of the patents lies Northport harbor, a land locked harbor; Eaton's Neck, and Eaton's Neck beach, lying between it and the

waters of the sound. *Held*, that said harbor was included in the grant, and the same having been confirmed by act of the colonial legislature (Act of May, 1691; 1 Bradford's Laws, 77), the title of the land under the waters of the harbor was thereby vested in the town, together with the exclusive right to oyster fishing therein. *Robins v. Ackertly*. 98

2. In 1879 the town leased to plaintiff a parcel of land under water in said harbor "to be exclusively used, occupied and enjoyed" by him "in the business of planting, growing, cultivating" oysters thereon. In an action for alleged trespass in taking up and injuring the oysters planted by plaintiff upon said land it appeared that said town had claimed title and an exclusive right to the land under water in the harbor, and to the fishing privileges from time immemorial; that it had regulated and exercised control over the fishing, and had made leases for marine railways and docks. *Held*, that the town had the right to execute the lease; that thereby it gave the plaintiff the exclusive right for the purposes specified; and that the action was maintainable. *Id.*

FORECLOSURE.

1. In an action to foreclose a mortgage covering two farms it appeared that L., the mortgagor, conveyed one of the farms to K., the latter assuming to pay, as part of the purchase-money, \$2,500 of the mortgage. L. had contracted to purchase a piece of land of B. who agreed to take the bond of K., secured by mortgage on the farm so to be conveyed to him for part of the purchase-price, and concurrently with the conveyance from L. to K., the latter executed his bond and mortgage to B., who conveyed to L. as agreed. B. knew, when he took his mortgage, of the existence of the prior mortgage and of K.'s assumption of a portion thereof. *Held*, that the judgment properly directed the sale first of the farm conveyed to K.; that the

circumstances under, which the mortgage to B. was given did not change the equitable rights of the parties. *Bowne v. Lynde.* 92

2. K. subsequently reconveyed the farm to L. who, in consideration thereof, agreed to and did convey ten acres of the farm to the wife of K., built a house thereon and procured a release thereof from the B. mortgage and agreed to protect it from the lien of the mortgage in suit. L. obtained the release from B. by giving him a guaranty to pay \$350 of his mortgage. *Held*, that this did not change the equities of the parties; that if the legal effect of the reconveyance was to release K. from his contract of assumption no right of B. was affected and the release did not inure to his benefit. *Id.*

3. A provision in the assignment of a bond and mortgage, guaranteeing its payment "by due foreclosure and sale," is not an absolute guaranty of payment, but is a conditional undertaking to pay any deficiency arising on foreclosure and sale. *Vanderbilt v. Schreyer.* 392

4. Such a guarantor, although conditionally liable only, was prior to the adoption of the Code of Civil Procedure, by force of the statute (3 R. S. 191, §§ 153, 154), properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency is proper. *Id.*

5. In an action to foreclose a mortgage so assigned, wherein S., the assignor and guarantor, was sought to be charged with a deficiency, he answered, alleging in substance that plaintiff contracted with G. and M. to erect for them certain buildings and receive in payment for the first installment due under the contract, an assignment from S. of the bond and mortgage in question; that plaintiff commenced performance, and when he became entitled to the first payment S. offered to assign, but plaintiff refused to accept or to go on with the work unless the guaranty was

made; that S., believing he was acting under compulsion, thereupon executed the assignment and guaranty in question, and that "no consideration ever passed to him (S.) or his principal, for such guaranty." S. offered to prove these allegations on the trial, but the same were excluded. *Held* error; that the facts alleged showed the guaranty to have been given without consideration; that the assignment itself was not conclusive on this point and might be disproved; that plaintiff had no right to demand the guaranty under his contract, and the incorporation of the guaranty into the assignment, for which there was a consideration, did not affect the question, as the guaranty was, so far as its legal effect was concerned, a separate instrument, which must be supported upon a sufficient consideration, or treated as *nudum pactum*; and that, therefore, the answer set up a good defense. *Id.*

6. Where a subsequent mortgagee foreclosed his mortgage, making the prior mortgagee a party defendant, but without setting forth or alluding to the prior mortgage, and obtained the ordinary judgment of foreclosure and sale, and where by the terms of sale the premises were sold free and clear of incumbrance, *held*, that the judgment did not constitute a bar to an action to foreclose the prior mortgage, although the mortgagee knew of the judgment and made no effort to have the same modified or set aside, it not appearing that he was present at or was cognizant of the manner in which the sale was made. *Smith v. Roberts.* 470

7. *It seems* that where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim

of collusion between him and the directors. *Harpending v. Munson*. 650

8. *It seems*, also, that a director of a railroad corporation may properly own its bonds secured by mortgage executed by it, and may enforce payment in case of default by foreclosure. *Id.*

9. *It seems*, also, that where a director so owning bonds of the company becomes the purchaser on foreclosure, an action cannot be maintained to impress a trust upon the property for the benefit of stockholders, because of fraudulent conduct on the part of the director in procuring the default which caused the foreclosure, at least without paying or offering to pay to him the amount of the bonds. The equity of the stockholders, if any, is only in the surplus after payment of the bonded debt, and the action would be in effect a bill to redeem. *Id.*

See MORTGAGE.

FORGERY.

— *Liability of bank to depositor for amount paid on check on which the indorsement of payee is forged.*

See *Bank of B. N. A. v. M. N. Bank*. 106

— *Vendor of forged note cannot avoid liability to refund purchase-money because of delay in detecting forgery.*

See *Frank v. Lanier*. 112

FORMER ADJUDICATION.

1. A judgment having been perfected in this action against plaintiff for costs and for damages occasioned by a temporary injunction issued therein, a settlement was made between the parties and a release executed by defendants in fraud of the rights of H. & B., their attorneys, which release was set aside on motion. An action was then brought by said attorneys against the parties herein to determine and

enforce their lien upon the judgment. Before the trial thereof the plaintiff here was discharged in bankruptcy. Judgment was rendered and perfected adjudging the former judgment to be in full force and unpaid, and that the attorneys had a lien to an amount specified, and were entitled to enforce a collection thereof. On motion under the Code of Civil Procedure (§ 1268), to have the judgment herein canceled and discharged of record because of the discharge in bankruptcy, *held*, that plaintiff was not barred by the judgment in favor of the attorneys; that said judgment had no other effect than to determine the extent of and to enforce their lien, leaving the original judgment, like other debts of the bankrupt, subject to the bankrupt law; and that he was entitled to the relief sought. *Blumenthal v. Anderson*. 171

2. The *ex parte* proof in bankruptcy is not such an adjudication as to the existence of a fact as to legally preclude the person making it from afterward explaining or contradicting the statements contained therein, at least as against one not in a legal sense a party. *Meltzer v. Doll*. 365

3. Where a subsequent mortgagee foreclosed his mortgage, making the prior mortgagee a party defendant, but without setting forth or alluding to the prior mortgage, and obtained the ordinary judgment of foreclosure and sale, and where, by the terms of sale, the premises were sold free and clear of incumbrance, *held*, that the judgment did not constitute a bar to an action to foreclose the prior mortgage, although the mortgagee knew of the judgment and made no effort to have the same modified or set aside, it not appearing that he was present at or was cognizant of the manner in which the sale was made. *Smith v. Roberts*. 470

4. A court of equity has no jurisdiction to set aside a will of personal property, which has been duly admitted to probate, because of fraud

or undue influence; the probate is conclusive. (2 R. S. 61, § 29.) *Post v. Mason.* 539

5. Nor can executors, as to a gift to them in a will so admitted to probate, be charged by a court of equity, as trustees of the next of kin, on the ground that the gift was obtained by fraud. *Id.*

6. Where a railroad corporation, by proceedings under the General Railroad Act (§ 17, chap. 282, Laws of 1854), acquired title to lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, putting in issue the necessity of the taking of all the lands sought to be condemned, *held*, that it was not open for the officials of the town to question, collaterally, the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway. *P. P. & C. I. R. E. Co. v. Williamson.* 553

7. An award, if valid, is a bar to an action on the original claim. *Wiberty v. Matthews.* 648

— *When judgment in action brought by executors for construction of will adjudging legacy not chargeable on real estate, not a bar to action by owner of legacy to have it so changed.* *Scott v. Stebbins.* 605

FRAUD.

— *Surrogate's decree admitting will of personal property to probate conclusive in collateral action on question of fraud.*

See Post v. Mason.

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GIFT.

U., plaintiff's intestate, in 1850 deposited a sum of money in a savings bank, which was credited to an account then opened with her, in trust for S. J. U., her daughter. The bank issued a pass-book, in which the account was entered, as with her, in trust for her said daughter. This deposit was subse-

quently drawn out. In 1874, U., having sold a house and lot, deposited \$2,000 to the credit of said account, which was entered in said pass-book. She also, at the same time, deposited \$25 to the credit of an account, with her in trust, for a grand-daughter, receiving another pass-book therefor, and on the same day she deposited the balance of the purchase-money received to her own credit, in another savings bank. U. retained the pass-book until her death. In an action to determine the title to the deposit, *held*, that the transaction disclosed an intention to create a trust for the benefit of the daughter; and that the latter was entitled to the fund. *Willis v. Smyth.* 297

GUARANTY.

1. A provision in the assignment of a bond and mortgage, guaranteeing its payment "by due foreclosure and sale," is not an absolute guaranty of payment, but is a conditional undertaking to pay any deficiency arising on foreclosure and sale. *Vanderbilt v. Schreyer.* 392

2. Such a guarantor, although conditionally liable only, was, prior to the adoption of the Code of Civil Procedure, by force of the statute (2 R. S. 191, §§ 153, 154) properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency is proper. *Id.*

3. In an action to foreclose a mortgage so assigned, wherein S., the assignor and guarantor, was sought to be charged with a deficiency, he answered, alleging in substance that plaintiff contracted with G. and M. to erect for them certain buildings and receive in payment for the first installment due under the contract, an assignment from S. of the bond and mortgage in question; that plaintiff commenced performance, and when he became entitled to the first payment S. offered to assign but plaintiff refused to accept or to go on with the work unless the guaranty was

made; that S., believing he was acting under compulsion, thereupon executed the assignment and guaranty in question, and that "no consideration ever passed to him (S.) or his principal, for such guaranty." S. offered to prove these allegations on the trial but the same were excluded. *Held* error; that the facts alleged showed the guaranty to have been given without consideration; that the assignment itself was not conclusive on this point and might be disproved; that plaintiff had no right to demand the guaranty under his contract, and the incorporation of the guaranty into the assignment, for which there was a consideration, did not affect the question, as the guaranty was, so far as its legal effect was concerned, a separate instrument, which must be supported upon a sufficient consideration, or treated as *nudum pactum*; and that, therefore, the answer set up a good defense. *Id.*

GUARDIAN AND WARD.

1. Where the guardian of an infant loans moneys belonging to his ward receiving securities for the amount loaned, with lawful interest; but as an inducement to make the loan, receives a sum of money, as a bonus, for his own benefit, from the borrower, who pays the same with knowledge as to the title to the moneys loaned, this does not make the transaction an usurious loan. The guardian is not a lender of the trust fund, within the meaning attached to that term by our statutes, relating to usury. *Fellows v. Longyor.* 324
2. The circumstance that the guardian has given a bond for the faithful performance of his duties does not affect the character of the transaction or of the securities so taken. *Id.*

HIGHWAYS.

1. Where a municipal corporation omits to act with reasonable diligence after notice of an unlawful

obstruction in a street which might occasion injury to persons lawfully thereon, it is no defense to an action for injuries so occasioned that it was not known to the corporation that the obstruction was in fact dangerous. *Rahberg v. Mayor, etc.* 137.

2. *It seems* that although the fee of a city street is in the city, an abutting owner is entitled to use it; and neither the legislature nor the city can devote it to purposes inconsistent with street purposes without compensation to such owner. *Mahady v. Bushwick R. Co.* 148
3. A horse railroad constructed under legislative authority on the surface of the street is not an unlawful interference with the rights of the abutting owner, but is a street use consistent with such rights. *Id.*
4. An unreasonable use of the street, however, by the railroad company, such as using a switch or siding thereon for the storing and deposit of its cars to the injury of an adjoining owner, gives a right of action to the latter for the special injury. *Id.*
5. One passing along a sidewalk has a right to presume it to be safe, he is bound to no special care and cannot be charged with negligence for not being on his guard against an unlawful obstruction, or for not looking for it, although it is visible. *McGuire v. Spence.* 303
6. Where a child is injured in consequence of an obstruction, it is not a defense that the child was playing upon the street, instead of using it for the ordinary purposes of travel; for children to play upon a sidewalk is not unlawful, wrong or negligent. *Id.*
7. Where a railroad corporation, by proceedings under the General Railroad Act (§ 17, chap. 282, Laws of 1854), acquired title to lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, put-

ting in issue the necessity of the taking of all the lands sought to be condemned, *held*, that it was not open for the officials of the town to question, collaterally, the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway. *P. P. & C. I. R. R. Co. v. Williamson.* 552

8. The authority given by the General Railroad Act (§ 1, chap. 62, Laws of 1858) to construct highways across railroad tracks does not extend to lands taken for depot purposes. *Id.*

HUSBAND AND WIFE.

1. An action by a wife against her husband for maintenance and support simply is not maintainable under the Code of Civil Procedure; the provision of said Code (§ 1766) authorizing a judgment, making provision for maintenance and support without a judgment of separation, applies only where the action is for a separation. *Ramsden v. Ramsden.* 281
2. It is only when an action is brought by the wife for divorce or separation, as prescribed by said Code, that an allowance for alimony is proper. *Id.*
3. Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, *held*, that the court had no jurisdiction to make an order granting alimony *pendente lite* or counsel fees. *Id.*
4. Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note, *held*, that it was

given for a good consideration and was valid; that the transaction could not be regarded as against public policy. *Adams v. Adams.* 381

INDICTMENT.

1. Where the doing of any one of several things constitutes an indictable offense an indictment may in a single count group them together and charge the accused with having committed them all, and a conviction may be had on proof of the commission of any one of the acts charged, without proof as to the others. *Bork v. People.* 5
2. The act of 1875 (Chap. 19, Laws of 1875), "to provide more effectually for the punishment of speculation and other wrongs affecting public moneys, and rights of property," applies as well to cases where the offender is an officer, agent or servant, having the custody of funds or property charged to have been misappropriated, or owing a special duty in relation thereto, as to a private individual having no official or confidential relation to the State or municipality defrauded. *Id.*
3. On the trial of an indictment under said act, it appeared that the prisoner, who was treasurer of the city of Buffalo, as such, received for sale, in accordance with the usual custom, certain negotiable bonds of the city, which the common council had authorized to be issued and sold for city purposes; these he put into the hands of a broker with directions to sell and credit the proceeds to a firm of which the prisoner was a member, which was done. Said firm was at the time indebted to the broker in a sum exceeding the sum realized from the sale of the bonds. No entry of the sale was made in any manner in the treasurer's books. The indictment charged that the accused "feloniously, wickedly and wrongfully did obtain and receive * * * and convert" to his own use said bonds. *Held*, that the transaction was a con-

version of the bonds, and, assuming that the prisoner did not wrongfully receive or obtain them, his wrongful conversion thereof was sufficient to sustain a conviction. *Id.*

4. The indictment gave a full description of the bonds; *held* that it was not defective because of the omission of an averment, that the bonds were held on behalf of "any public or governmental interest," as this was necessarily implied in the description. *Id.*

5. Also *held*, that an averment that the bonds were negotiable was unnecessary. *Id.*

INFANTS.

1. Where a child is injured in consequence of an unlawful obstruction, it is not a defense that the child was playing upon the street, instead of using it for the ordinary purposes of travel; for children to play upon a sidewalk is not unlawful, wrong or negligent. *McGuire v. Spence.* 303

2. Although from an infant, if *sui juris*, a less degree of care is required than from a person of mature age, yet he is chargeable with some degree of care and prudence in approaching a known danger, and is responsible for the consequences of some degree of negligence; and in an action for injuries to him occasioned by negligence of another, absence of this degree of negligence on his part must be made to appear to authorize a recovery. *Wendell v. N. Y. C., etc.* 420

INSOLVENCY

— When insolvency of corporation and assignment by it for benefit of creditors, does not justify a party, who has entered into contract with it, to treat contract as rescinded.

See N. E. I. Co. v. G. (Met.) E. R. Co. 153

INSURANCE (FIRE).

1. Where, by a policy of insurance is-

sued to the owner of mortgaged property, the loss, if any, is made payable to the mortgagee to the extent of his mortgage interest, the owner and the mortgagee may properly be joined as plaintiffs in an action upon the policy. *Winn v. Nia. F. Ins. Co.* 185

2. In an action upon an alleged contract of insurance it appeared that F., a general agent of the defendant, authorized to bind the company by his contracts in the first instance, had insured a building on property belonging to plaintiff H. W. W., for several years to the amount of \$2,000, the policies being each for one year. The last policy expired July 1, 1876. Defendant, in accordance with its usual custom, sent to F., in June preceding, a paper called an "expiration sheet," showing the policies expiring in July; opposite the policy in question was written the word "drop." Thereupon F. agreed to reinsure the building for \$1,000. A policy was written by F. who directed it to be reported to defendant and it was entered by his clerk in the register of completed contracts, but before delivery the building was burned. F. had been accustomed to give the insured credit for premiums and to hold the policies until called for. *Held*, that the circumstances authorized an inference that the parties intended the new policy to be for the same time and at the same rate of premium as the policy which had just expired, the two differing only in amount; that, therefore, a finding that the minds of the parties met and a completed contract of insurance was entered into was justified; also, that the word "drop" was not an absolute prohibition against any insurance, but authorized the construction put upon it by F., that the risk was to be reduced. *Id.*

3. A covenant in a mortgage, to keep buildings on the mortgaged premises insured for the benefit of the mortgagee, is not a covenant running with the land, but is entirely personal in its character. *Reid v. McCrum.* 412

4. The holder of the mortgage, therefore, cannot claim the benefit of insurance upon the buildings procured by one holding under a conveyance of the equity of redemption from the mortgagor. *Id.*
5. Where, however, the owner of the fee, who by his deed took subject to the mortgage, procured insurance, and by directions of his general agent, who had charge of all his business, including insurance, indorsements were made upon the policies, making the loss, if any, payable to the mortgagee, *held*, that the latter was entitled to the insurance, and that his right was not affected by a revocation of the direction and a cancellation of the indorsement made, without his knowledge or assent, by the agent. *Id.*
6. A policy of insurance against loss by fire or lightning, issued by defendant, contained this clause: "In case differences shall arise, touching any loss or damage, after proof thereof has been received, in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators." And it was provided that no suit upon the policy should be brought against the company until after an award, "fixing the amount of such claim, in the manner above provided." The policy gave to defendant the option, in case of loss, "to repair, rebuild, or replace the property." A loss having occurred, defendant, under this option clause, elected to repair and restore the building insured to its former condition, and, after doing some work, informed the insured that the repairs were finished. The insured, claiming the repairs to be insufficient, made and served proofs of loss. Defendant orally requested the insured to arbitrate the question of damages, and after commencement of this action upon the policy, offered, in writing, to arbitrate; these offers were refused. *Held*, that the said refusal was not a defense; that defendant, having the right to determine the manner in which it would perform, and having elected to repair, this involved not only a rejection of the right to discharge its liability by the payment of damages, but also of those provisions of the contract having reference to that method of performance; that from the time of such election, the contract became simply an undertaking, on the part of the defendant, to restore the building insured to its former condition, and the measure of damages for a breach thereof did not necessarily depend upon the amount of damages inflicted by the peril insured against; and that, therefore, the provision as to arbitration was rendered inoperative by the election to repair. *Wynkoop v. Nia. F. Ins. Co.* 478
7. Also *held*, that the testimony of experts called by the plaintiff, estimating the value of the different kinds of work and materials required to put the building in as good a condition as it was before the injury, was properly received. *Id.*
8. The act of 1880 (Chap. 110, Laws of 1880) regulating the examinations and reports of fire insurance companies does not affect the status, as taxable property, of premiums upon unexpired policies held by such a company. *People, ex rel. W. F. Ins. Co., v. Davenport.* 574
9. The liability of the company to refund a part of such premiums to the assured upon surrender of the policies does not constitute a debt owing by it, and in assessing the value of its taxable property it cannot claim a deduction of the whole amount of unearned premiums (EARL, J., dissenting). *Id.*
10. The relator was assessed \$76,000 upon personal property; it appeared before the assessors and asked to have the same stricken from the assessment. In the affidavit upon which the application was based it was conceded that the company had \$339,600 of personal property subject to taxation unless exempt by reason of its contingent liability for unearned premiums; this was stated to be about \$840,-

000. No statement was made as to the amount of the outstanding policies, the cost of reinsuring the risks, or the method by which the amount of liability stated was reached. The assessors refused to strike out the assessment. Their return to a writ of *certiorari* did not state the evidence upon which they proceeded, but alleged that the assessment "was duly and legally made." *Held* (EARL, J., dissenting), there was no evidence showing that the assessors did not deduct from the conceded assets all the relator was entitled to have deducted on account of said contingent liabilities, and in the absence of such evidence it was to be assumed that they proceeded legally. *Id.*

INSURANCE (LIFE).

1. Where, in an action brought by the attorney-general against an insolvent life insurance company, after the entry of judgment dissolving the corporation and appointing a receiver of its assets, certain of the policy-holders were allowed to intervene, who appeared by attorneys and contested the allowance of commissions, claimed by the receiver, which were materially reduced, *held*, that the court had no power to make allowance to the intervenors out of the funds in the hands of the receiver for their disbursements and counsel fees, as they were simply individual parties protecting their own interests. *In re Atty.-Gen'l v. N. Am. L. Ins. Co.* 57
2. The cases where such allowances have been made to trustees, or to one or more of several persons interested in a common fund who have brought suit to protect or recover the fund, distinguished. *Id.*
8. Where a registered policy life insurance company which has entered into a contract with a general agent for his services for a specified term at a stipulated salary, before any breach of the contract on its part, is restrained from further prosecuting its business or exercising its corporate franchises by

order of the court, and a receiver of its assets is appointed in proceedings under the insurance law (§ 7, chap. 903, Laws of 1869), the agent has no valid claim upon the fund in the hands of the receiver for damages for alleged breach of the contract, because of the discontinuance of the employment; at least, in the absence of evidence that it was some fault of the company which induced the superintendent of the insurance department to make the certificate upon which the attorney-general acted. There is, in such case, no breach on the part of the company, as performance is prevented, and the contract dissolved by the action of the State. *People v. Globe Mut. L. Ins. Co.* 174

4. The difference between the position of agents and that of policy-holders pointed out. *Id.*

5. *It seems* that as between the company and one of its officers thus contracting with it, its dissolution by virtue of such proceedings is to be deemed the independent act of the State, and not the act of the corporation, whatever may have been the cause prompting the act. The officer so contracting takes the risk of any act or neglect on the part of the other officers which tends, under the law, to produce dissolution. *Id.*

— Where policy-holder has surrendered policy and taken new one, holder only entitled to value of new policy as claim against the assets of the company in the hands of a receiver.

See In re Atty.-Gen'l v. Cont'l L. Ins. Co. (Mem.) 647

INTEREST.

Under the provision of the act of 1870 (Chap. 78, Laws of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury have nothing to do

with the question of interest; that is to be added to the damage inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the interest. *Manning v. Pt. H. Iron Ore Co.* 634

JUDGMENT.

1. Where, upon the same day of the issuing of a summons by a justice of the peace, but after its service and actual return by the constable with proper certificate of service, the parties appeared by attorneys who duly swore to their authority to so appear, and plaintiff's attorney filed his complaint in writing, whereupon defendant's attorney made an offer in writing to allow judgment for the amount claimed in the complaint, which was accepted and judgment entered accordingly. *Held*, that the judgment was valid; also *held*, that authority to defendant's attorney to appear for her empowered him to make the offer of judgment, and that, therefore, it was not necessary, in addition to swearing to authority to appear generally, that he should have sworn to authority to make the offer. *Fowler v. Haynes.* 846

2. In an action to recover the possession of personal property, defendant claimed under a judgment against plaintiff's assignor, and execution thereon levied on the property, alleging that the transfer to plaintiffs was fraudulent and void as to creditors. The property was taken and delivered to plaintiffs. Defendant succeeded in his defense. The value of the property as found was more than enough to pay the execution and officer's fees. *Held*, that judgment for the full value of the property in case a return thereof could not be had was erroneous; that the recovery, inasmuch as the transfer was valid as between the parties thereto, and so plaintiffs occupied the position of general owner, should have been limited to the amount of defendant's lien. *Id.*

— *In action against stockholders of a manufacturing corporation to enforce liability to creditor the county treasurer was directed to docket judgments against defendants for maximum liability and to collect by execution enough to pay claims of creditors with costs and out of proceeds to retain his lawful commissions. Held*, that said commissions were not taxable as an item of plaintiff's disbursements. *See Veeder v. Judson.* 374

JUDICIAL SALE.

— *When sale on foreclosure of railroad mortgage may not be attacked because the directors were actuated by corrupt motives in suffering default in payment of bonds. See Harpending v. Munson.* 650

JURISDICTION.

1. H. died, leaving a will and three codcills; these were presented for probate, which was contested. On stipulation of the parties an order was entered to the effect that the personal assets of the estate be paid into court to abide the result of the litigation, and the surrogate thereupon took possession thereof. That officer admitted the will to probate, but denied probate of the codcills. The executors named therein, who had joined in the stipulation, appealed to the Supreme Court, where the decree of the surrogate was reversed as to the first codicil and affirmed as to the others. After the death of the surrogate, and on application of said executors to his successor, the decree was declared null and void, on the ground that the surrogate was interested. *Held* error; that the interest was not a disqualifying one; and that the parties by whose consent the trust was reposed could not be heard to complain; also, that as by law the funds on hand at the death of the said surrogate passed into the custody of his successor, the latter could not exercise jurisdiction to vacate the decree for a cause which existed equally as to himself. *In re Will of Hancock.* 284

2. As incident to the duties imposed upon surrogates by the Code of Civil Procedure (§§ 2478, 2481, 2743), to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. *In re Will of Verplanck.* 439
3. A court of equity has no jurisdiction to set aside a will of personal property, which has been duly admitted to probate, because of fraud or undue influence; the probate is conclusive. (2 R. S. 61, § 29.) *Post v. Mason.* 539
4. Nor can executors, as to a gift to them in a will so admitted to probate, be charged by a court of equity, as trustees of the next of kin, on the ground that the gift was obtained by fraud. *Id.*
5. Under the provisions of the Military Code (§§ 124, 125, chap. 80, Laws of 1870, as amended by chap. 228, Laws of 1875) authorizing the commanding officer of each regiment, etc., to appoint a person to take charge of the armory, whose compensation, within the prescribed limits as certified by the commanding officer, shall be a county charge, the board of supervisors of the county has no jurisdiction to audit or review the amount of compensation so certified, the board has no other duty in reference thereto, except to cause the amount to be levied, collected and paid like other county charges. *People, ex rel. Archambault, v. B'd of Sup'rs.* 672
- iff authorizing the justice to render judgment accordingly, the words "on the return of process" do not limit the authority to the return day specified in the process, but it may be exercised immediately after service and actual return thereof. *Fowler v. Haynes.* 846
2. Where, therefore, upon the same day of the issuing of a summons by a justice of the peace, but after its service and actual return by the constable with proper certificate of service, the parties appeared by attorneys who duly swore to their authority to so appear, and plaintiff's attorney filed his complaint in writing, whereupon defendant's attorney made an offer in writing to allow judgment for the amount claimed in the complaint, which was accepted and judgment entered accordingly. *Held*, that the judgment was valid; also *held*, that authority to defendant's attorney to appear for her empowered him to make the offer of judgment, and that, therefore, it was not necessary, in addition to swearing to authority to appear generally, that he should have sworn to authority to make the offer. *Id.*

LACHES.

JUSTICE'S COURT.

1. Under the provisions of the Code of Procedure (Subd. 15, § 64), as amended in 1860, authorizing the defendant in an action in a justice's court, to make an offer of judgment "on the return of process and before answering," and upon acceptance thereof by plaintiff
1. One who has sold, as genuine, a forged note cannot avoid his liability to refund the purchase-money, because of delay in detecting the forgery; no mere lapse of time, however long, can confirm his title to the money, if the vendee exercise reasonable diligence in giving notice of the discovery of the forgery. *Frank v. Lanier.* 112
2. Defendants in November, 1867, sold to plaintiffs four counterfeit U. S. "seven-thirty notes," which were sold by plaintiffs, on the same day, to various parties; in December, 1867, plaintiffs were notified that they were forgeries, and, on the same day, notified defendants, and demanded back the money paid. Defendants' reply was that if plaintiffs "had to pay for those

notes, or brought them evidence that they were counterfeit, they would pay." In January, 1868, plaintiffs were sued for the money received by them for three of the notes; they gave notice to defendants, and requested them to defend: this they did not do. Judgment was obtained against plaintiffs in March, 1878; after the verdict therein they notified defendants of the result. Plaintiffs paid the judgment and also paid back the money received for the other note. *Held*, that defendants having been afforded an opportunity to take back the paper, or establish its value, and not having done either, could not be heard to say that it was unreasonable for the plaintiffs to await the result of a judicial determination as to the character of the paper, or, that having done so, they were not entitled to recover back the money this determination showed they had paid without consideration. *Id.*

3. There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with the direction; what is a reasonable time must depend upon the circumstances of each particular case. *In re Estate of Weston.* 502

4. In 1867, S., defendant's testator, for the purpose of procuring the discharge of A. from arrest, under an order of arrest issued in an action brought against him by plaintiff, executed an undertaking to the effect that A. would at all times hold himself amenable to process issued to enforce the judgment. In July, 1868, plaintiff obtained judgment. A. remained within the jurisdiction of the court until December, 1868, when he left the State; he returned in February, 1869, to his former home and remained about a month. S. died in 1870. A. returned again to the State in June, 1871, where he remained, openly visiting in plaintiff's neighborhood for five or six weeks. Plaintiff did not enter judg-

ment until April 31, 1874; execution was issued thereon against the property of A. on April 23, which was returned unsatisfied, and on May 4, 1874, an execution against the person was issued and returned not found. In an action upon the undertaking defendant gave evidence to the effect that in October, 1868, and in June, 1871, notice to proceed was given to plaintiff's attorneys. The court submitted to the jury the question as to whether plaintiff's delay in entering judgment and issuing process had injured or impaired the rights of the surety, charging in substance, that if no injury had resulted therefrom, plaintiff was entitled to recover. *Held* error; that the entry of judgment and issuing of process against the testator's principal were conditions precedent to the liability of the surety, that a neglect to perform such conditions with due diligence discharged the surety; and that the facts conclusively established *laches.* *Toles v. Ades.* 562

5. Also *held*, that, conceding it to have been necessary for the defense to prove injury to the surety by the delay, such impairment and injury were conclusively established, and the submission of the question to the jury was error. *Id.*

6. Evidence was given on the part of the plaintiff that in August, 1868, S. requested plaintiff not to proceed further in the action. *Held*, that assuming this to have been established, the request could not be deemed to continue after the death of S., and even without any request upon the part of the defendants, his executors, if plaintiff desired to hold the estate responsible, it then became her duty to use due diligence, which she failed to do. *Id.*

LAW OF PLACE.

See CONFLICT OF LAWS.

LEASE.

Plaintiff and L. M. H., her testatrix, executed a lease, under seal, of their interest, to defendant, who

went into possession under it. Subsequently, differences having arisen, the parties entered into an agreement, under seal, to submit the matters in difference to arbitrators, which contained a provision that "the lease shall be surrendered," the arbitrators to determine how much damage or compensation, if any, shall be paid by the lessors to the lessee "for such surrender." The lease was delivered to the arbitrators, who made an award which was set aside as void. Thereafter, L. M. H. and one of the arbitrators died. In an action to recover rent reserved by the lease, *held*, that the agreement to arbitrate, at the moment of its execution, operated as a surrender and cancellation of the lease; that neither the failure to make a valid award, nor the revocation of the submission by death of one of the arbitrators or of one of the parties operated to revive the lease; and that, therefore, the action was not maintainable. *Harris v. Hiscock.* 340

— *By town, of land under water with exclusive right to cultivate oysters thereon, when valid.*

See Robins v. Ackertly. 98

LEGACY.

1. The will of H. gave to his two sons each an undivided half of certain real estate; to his son A. a legacy of \$5,000; to his son J. \$2,000 and discharged him from all indebtedness for sums advanced, thus, as the testator declared, making the shares of his two sons equal. After certain specific bequests and legacies he gave the rest and residue of his estate, real and personal, to S., one of his executors in trust. *First*, to pay the interest, or so much thereof as should be necessary to the support of the testator's father during life. *Second*, to pay out of the proceeds of said residuary estate to the O. C. Seminary \$15,000, and the balance with any unexpended income to the two sons in equal proportions. The executor was empowered to sell as he should

think just. The testator inventoried his personal property about a month before he made the will at \$22,500. He thereafter purchased real estate, built a house upon his lands, etc., and the proceeds of the personalty remaining at his death after the payment of debts amounted to but about \$2,000. *Held*, that the legacy given to A. was chargeable upon the residuary real estate. *Scott v. Stebbins.* 605

2. Also *held*, that an action to have said legacy declared a lien upon the residuary real estate was properly brought within ten years after the cause of action arose; that the six years' statute of limitations did not apply. *Id.*

LEGITIMACY.

1. When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller.* 315

2. In an action of ejectment, wherein plaintiff M. claimed as the widow, and the other plaintiffs as children of H., a citizen of the United States, it appeared that H., who resided in the city of New York, while stopping at a hotel in London, in 1871, made the acquaintance of plaintiff M., an English subject and an employe in the hotel. A promise to marry, on his part, and an intention of marriage between them was proved; also a mutual consent to be, and to live together, as husband and wife, and a subsequent cohabitation in that apparent relation. The evidence, however, established that the cohabitation did not commence with a marriage, valid by the English law, and there was no evidence of a subsequent marriage, in accordance with that law. In June, 1871, the parties went to Paris, where they lived together as husband and wife, and he introduced her

to acquaintances as his wife. They returned to London, where they lived together until his death which occurred in 1874, and where the children, who are plaintiffs, were born. H. addressed M. as Mrs. H., and so addressed letters to her, and their life in England was the ordinary household life of persons lawfully married. *Held*, that while the evidence was insufficient to show, or to raise a presumption of a marriage, in accordance with the requirements of the English law, in the absence of proof as to the marriage-law of France it might be assumed that the requisites to constitute a marriage in that country are the same as our own, and so that the mutual assent of the parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage; and that the evidence raised a presumption and authorized a finding that the parties interchanged matrimonial consents in France. *Hynes v. McDermott*. 451

LIBEL.

The complaint, in an action for libel, alleged the writing and sending by defendant of a letter which contained the matter claimed to be libelous. At the beginning of the trial and before any evidence had been given, defendant objected to any evidence, on the ground that the letter was a privileged communication, which objection was overruled. At the close of plaintiff's evidence a motion was made for a nonsuit on the ground "that if the letter was not a privileged communication the proof showed that plaintiff had sustained no damage * * *, and the letter was not libelous on its face." *Held*, that the question as to whether the letter was a privileged communication was not effectively raised; that it was not presented by the motion for nonsuit, and the preliminary objection was unavailing, as there were then no facts before the court upon which it could be determined. *Brooks v. Harrison* 83

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LIEN.

Where a purchaser of part of mortgaged premises assumes to pay the mortgage as part of the purchase-money, the portion so purchased becomes, in equity, the primary fund for such payment. *Bowne v. Lynde*. 92

— *Lien of attorneys on judgment, how affected by discharge in bankruptcy of judgment debtors.*

See Blumenthal v. Anderson. 171

See CHATTEL MORTGAGE.
FACTOR.
MORTGAGE.

LIMITATION OF ACTIONS.

1. On March 9, 1870, plaintiff, who had a deposit account with defendant, drew its check payable to the order of H. On the same day the check was certified by defendant's teller. On the next day it was presented by some person other than H., with her indorsement forged thereon, and was paid by defendant and the amount thereof charged to plaintiff. On March 17, 1870, in accordance with the usual course of dealing between the parties, plaintiff's pass-book was written up, balanced and returned; it contained the charge of the check, which was also delivered up as a voucher. Plaintiff had no notice or knowledge of the forgery until January, 1877; in June thereafter, it tendered the check and demanded of defendant payment of the amount thereof, and brought this action to recover the same in November, 1877. *Held*, that the action was not barred by the statute of limitations; that the certification did not make the check due without demand. *B'k British N. Am. v. Mer. Nat. B'k*. 108
2. While a debtor may confer authority upon another to make a payment for him which will be effectual as against a plea of the statute of limitations, the authority should be clearly established. *Littlefield v. Littlefield*. 208

8. One of three makers of a joint and several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note, *held*, that these facts did not show an authority conferred upon the principal to make a payment as the agent of the surety, so as to take the case as to the latter out of the statute of limitations; also that they failed to establish a ratification of the payment. *Id.*

— *An action to have a legacy declared a lien upon real estate is properly brought within ten years after cause of action arose.*

See Scott v. Stebbins.

605

MANDAMUS.

1. Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, this is equivalent to a demurrer, and he cannot complain if the court pass upon the motion instead of ordering an alternative writ. *People, ex rel. Hartford L. & An. Ins. Co., v. Fairman.* 385
2. After a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here. *Id.*

— *When proper to compel comptroller of city to countersign warrant.*
See People, ex rel. v. Crissey. 616

— *When proper to compel board*

of supervisors to levy and pay claim for taking care of armory.

See People, ex rel. v. Sup'rs. (Mem.) 672

MANUFACTURING CORPORATION.

1. A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act (§ 10, chap. 40, Laws of 1848) to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by these in their own right and for their own especial benefit. *Farnsworth v. Wood.* 308
2. In an action brought by plaintiff as creditor of a manufacturing corporation, on behalf of himself and other creditors, against the stockholders, to enforce the liability imposed by the General Manufacturing Act (§ 12, chap. 40, Laws of 1848) upon stockholders, a judgment was entered authorizing and directing the county treasurer to docket judgments against the stockholders for the maximum amount of their possible liability, and to collect thereon, by execution, enough to pay the claims of creditors, as proved, and their costs, and out of the payments to him to retain his lawful commissions, and distribute the residue to those entitled. The commissions of the county treasurer were stated in plaintiff's bill of costs, and taxed as an item of disbursements. *Held* error; that the county treasurer was authorized in issuing executions, for the purpose of providing enough to pay creditors, to include his commissions and they were not properly chargeable as plaintiff's disbursements. *Veeder v. Judson.* 374
3. Certain of the papers in the case were printed upon the request of the attorneys for some of the de-

fendants and by direction of the referee, the expense was taxed as an item of disbursements. *Held* error. *Id.*

MARRIAGE.

1. The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest known to the law, especially in cases involving legitimacy. Where there is enough to create a foundation for the presumption, it can be repelled only by the most cogent and satisfactory evidence. *Hynes v. McDermott.* 451.
2. As to whether the general rule of law that a marriage, valid or void by the *lex loci*, is valid or void everywhere, applies to the case of a domiciled citizen of this State, who, while temporarily sojourning in another country, contracts a marriage there, valid under our laws, but invalid by the law of the place, *quære.* *Id.*
3. In an action of ejectment, wherein plaintiff M. claimed as the widow, and the other plaintiffs as children of H., a citizen of the United States, it appeared that H., who resided in the city of New York, while stopping at a hotel in London, in 1871, made the acquaintance of plaintiff M., an English subject and an employee in the hotel. A promise to marry, on his part, and an intention to marry between them was proved; also a mutual consent to be, and to live together, as husband and wife, and a subsequent cohabitation in that apparent relation. The evidence, however, established that the cohabitation did not commence with a marriage, valid by the English law, and there was no evidence of a subsequent marriage, in accordance with that law. In June, 1871, the parties went to Paris, where they lived together as husband and wife, and he introduced her to acquaintances as his wife. They returned to London, where they lived together until his death which occurred in 1874, and where the children, who are plaintiffs, were born. H. addressed M. as Mrs. H., and so addressed letters to her, and their life in England was the ordinary household life of persons lawfully

married. *Held*, that while the evidence was insufficient to show, or to raise a presumption of a marriage, in accordance with the requirements of the English law, in the absence of proof as to the marriage law of France it might be assumed that the requisites to constitute a marriage in that country are the same as our own, and so that the mutual assent of the parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage; and that the evidence raised a presumption and authorized a finding that the parties interchanged matrimonial consents in France. *Id.*

4. Defendants, to meet this presumption, gave evidence to the effect that after the return of the parties to England, M., in business transactions, used the name she bore before her acquaintance with H. M., as a witness, gave explanation as to the reason for using such name in certain of the transactions; as to others she denied such use. *Held*, that as the facts sworn to by defendant's witnesses were either contradicted or did not conclusively repel the presumption of marriage, this court was precluded from reviewing the question (Code of Civil Procedure, § 1337), and the finding of the jury was conclusive. *Id.*

MASTER AND SERVANT.

— *As to liability of railroad corporation to employe.*

See Sheehan v. N. Y. C. & H. R. R. Co. 332
Mann v. Prest., etc., D. & H. C. Co. 495

— *As to duty of one employing another to make repairs on premises to warn him of a dangerous place or to guard it.*

See Homer v. Everett. (Mem.) 641

See PRINCIPAL AND AGENT.

MECHANIC'S LIEN.

The Mechanic's Lien Law of 1875, for the city of New York (Chap. 379, Laws of 1875) was not repealed by the lien law of 1880 (Chap. 486, Laws of 1880), for the cities of the State. *McKenna v. Edmundstone.* 231

MERGER.

1. While a merger at law follows upon the union of a greater and a lesser estate in the same ownership, it does not follow in equity, and estates will be kept separate where such is the intention of the parties and justice requires it. *Smith v. Roberts.* 470
2. That intention may be gathered, not only from the acts and declarations of the party, but from a view of the situation as affecting his interests, at least prior to the presence of some right in a third person. *Id.*
8. Until such right intervenes the intention as to merger remains subject to change, and whatever occurs between the parties interested, tending to show the intention, is, when the question of merger is in issue, admissible as part of the *res gesta.* *Id.*

MILITARY LAW.

1. Under the provisions of the Military Code (§§ 124, 125, chap. 80, Laws of 1870, as amended by chap. 228, Laws of 1875) authorizing the commanding officer of each regiment, etc., to appoint a person to take charge of the armory, whose compensation, within the prescribed limits as certified by the commanding officer, shall be a county charge, the board of supervisors of the county has no jurisdiction to audit or review the amount of compensation so certified; the board has no other duty in reference thereto, except to cause the amount to be levied, collected and paid like other county charges. *People, ex rel. Archambault, v. Bd. Suprs.* 672
2. An allowance for Sundays necessarily employed in caring for the armory is not prohibited or condemned by any statute, and the supervisors have no authority to deduct such an allowance. *Id.*

MILK.

The complaint charged the speaking

of alleged slanderous words, which were substantially that plaintiff was offering for sale to a cheese factory, the milk of his dairy which was poisonous and impure, by reason of his suffering a horse having a sore upon its neck, discharging filthy and impure matter, to run in the pasture with his cows, and drink from the same water and share the same food. Defendant claimed upon the trial, upon the testimony of experts called by him, that the necessary consequence of the facts stated was to render the milk impure and poisonous. *Held*, that assuming this to be true, the words charged a misdemeanor (§§ 1, 2, chap. 544, Laws of 1864; and were actionable *per se.* *Brooks v. Harrison.* 83

MISTAKE.

— A depositor whose check has been paid on strength of forged indorsement of payee's name is not precluded from recovering amount of bank by receiving check under mistake as to facts.

See Bank of B. N. A. v. M. N. Bank. 106

— When moneys paid to assignee of contract for sale of land under mistake as to title, cannot be recovered back.

See Youmans v. Edgerton. 403

MONEY HAD AND RECEIVED.

1. S. and K. entered into a contract for the sale by the former, and purchase by the latter, of certain premises, the purchase-price to be paid by installments; S. to convey "by good and sufficient deed," when all the purchase-money was paid. K. entered into possession under the contract; S. assigned the contract for full value to E., defendant's testator; K. assented thereto, and after making a payment upon the contract to E., assigned his interest therein to H., who paid the balance and then demanded of E. a deed or re-payment of the moneys paid. The title to the land was not in fact in S. and

he, when the last payment was made, was insolvent. *Held* (EARL, J., dissenting), that in the absence of any proof of fraud or bad faith, an action was not maintainable against E. to recover back the money paid; that the assignment to E. transferred no title to the land and imposed upon him no obligation; that the money he received was actually due to him, and that there could be no obligation to refund it; that plaintiff's remedy was by action against S. *Youmans v. Edgerton.* 403

2. The referee found that at the time of payment the parties were ignorant that the title was not in S. *Held* immaterial; that the mistake did not create any obligation on the part of E. *Id.*

MORTGAGE.

1. Where a purchaser of part of mortgaged premises assumes to pay the mortgage as part of the purchase-money the portion so purchased becomes, in equity, the primary fund for such payment. *Boune v. Lynde.* 92
2. A covenant in a mortgage, to keep buildings on the mortgaged premises insured for the benefit of the mortgagee, is not a covenant running with the land, but is entirely personal in its character. *Reid v. McCrum.* 412
3. The holder of the mortgage, therefore, cannot claim the benefit of insurance upon the buildings procured by one holding under a conveyance of the equity of redemption from the mortgagor. *Id.*
4. Where, however, the owner of the fee, who by his deed took subject to the mortgage, procured insurance, and by directions of his general agent, who had charge of all his business, including insurance, indorsements were made upon the policies, making the loss, if any, payable to the mortgagee, *held*, that the latter was entitled to the insurance, and that his right was not affected by a revocation of

the direction and a cancellation of the indorsement made without his knowledge or assent, by the agent. *Id.*

5. A purchase by and conveyance to a mortgagee of an undivided part of the mortgaged premises, where it does not appear that there was a payment or merger of the mortgage, or any portion thereof, operates as a release of the portion conveyed from the lien of the mortgage, leaving it to rest solely upon the portion unconveyed. *Smith v. Roberts.* 470
 6. A subsequent mortgagee of the part unconveyed, where the prior mortgage is recorded, is chargeable with notice and takes subject to the lien thereof. *Id.*
 7. Where such subsequent mortgagee foreclosed his mortgage, making the prior mortgagee a party defendant, but without setting forth or alluding to the prior mortgage, and obtained the ordinary judgment of foreclosure and sale, and where by the terms of sale the premises were sold free and clear of incumbrance, *held*, that the judgment did not constitute a bar to an action to foreclose the prior mortgage, although the mortgagees knew of the judgment and made no effort to have the same modified or set aside, it not appearing that he was present at or was cognizant of the manner in which the sale was made. *Id.*
- See* CHATTEL MORTGAGE.
FORECLOSURE.
- #### MOTIONS AND ORDERS.
1. Under the provision of the Code of Civil Procedure (§ 1421), providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite

in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon. *Hessberg v. Riley.* 377

2. Upon motion for such substitution the plaintiff may not be heard to object, that notice of the motion was not served upon the officer who made the levy, as he does not represent that officer. *Id.*

3. *It seems* that the motion being made for the benefit of the officer it is to be presumed that he has notice; and, when he does not object, that he assents to the proceeding. *Id.*

4. The amount claimed in such an action was \$2,000; the undertaking was for \$1,000. *Held*, that it was a matter in the discretion of the court below whether to require additional security and that the difference did not authorize a refusal of a motion to substitute the sureties. *Id.*

5. Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, this is equivalent to a demurrer, and he cannot complain if the court pass upon the motion instead of ordering an alternative writ. *People, ex rel. Hartford L. & An. Ins. Co., v. Fairman.* 385

6. After a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here. *Id.*

MUNICIPAL CORPORATIONS.

1. Where power is conferred upon a municipal corporation to make lo-

cal improvements, its exercise is quasi judicial or discretionary, and for a failure to act or an erroneous estimate of the public needs, a civil action cannot be maintained against it. *Urquhart v. City of Ogdensburg.* 67

2. Where, therefore, an accident was alleged to have been occasioned by an alleged defect in the plan upon which a sidewalk was constructed, *i. e.*, that the slope was too great, *held*, that the municipal corporation was not liable; also, that the fact that the corporation did not, prior to the construction of the sidewalk, expressly adopt the plan upon which it was constructed did not impose such liability; that the approval of the plan when completed was as much a judicial act as the design of it. *Id.*

3. Where a municipal corporation omits to act with reasonable diligence after notice of an unlawful obstruction in a street which might occasion injury to persons lawfully thereon, it is no defense to an action for injuries so occasioned that it was not known to the corporation that the obstruction was in fact dangerous. *Reiberg v. Mayor, etc.* 137

4. *It seems* that although the fee of a city street is in the city, an abutting owner is entitled to use it; and neither the legislature nor the city can devote it to purposes inconsistent with street purposes without compensation to such owner. *Mahady v. Bushwick R. Co.* 148

5. A horse railroad constructed under legislative authority on the surface of the street is not an unlawful interference with the rights of the abutting owner, but is a street use consistent with such rights. *Id.*

See NEW YORK (CITY OF).
TROY (CITY OF).

MURDER.

1. While, under the statute defining

murder in the first degree (§ 5, chap. 644, Laws of 1873), the "deliberate and premeditated design" to kill essential to constitute that crime must precede the killing for an appreciable space of time, sufficient for some reflection and consideration, and the formation of a definite purpose; if sufficient for this it is immaterial how brief the space is. *People v. Majone*. 211

2. Upon the trial of an indictment for said crime the evidence upon the part of the prosecution was to the effect that the prisoner, an Italian, married a young Italian girl and with her lived for a time with her parents. He did not live harmoniously with his wife and had some difficulty with his mother-in-law. He entered the room where his wife and her parents were with a friend for the purpose of procuring a paper in his charge belonging to the latter. His wife was hanging clothes out of a window, he asked her to go into a bed-room and bring out a box containing the paper. She replied that she was hanging out clothes, and that he should go and get the box for himself. He took her by the arm and led her into the bed-room, saying, "Will you go or will I go." Immediately thereafter he shot and killed her, came out with the revolver in his hand with which the shooting had been done, and putting the weapon to the head of his mother-in-law he fired and killed her. The indictment was for the last killing. The revolver belonged to the prisoner and had been for some time in his possession. *Held*, that the testimony established that the killing was intentional, deliberate and premeditated. *Id.*

NATIONAL BANKS.

An action in the Supreme Court against a National bank need not be brought in the county where the bank is located, but may be brought in any county where the plaintiff resides. *Talmage v. Third Nat. B'k*. 531

NATIONAL GUARD.

See MILITARY LAW.

NEGLIGENCE.

1. Where an accident was alleged to have been occasioned by an alleged defect in the plan upon which a sidewalk of a city was constructed, *i. e.*, that the slope was too great, *held*, that the municipal corporation was not liable; also that the fact that the corporation did not, prior to the construction of the sidewalk, expressly adopt the plan upon which it was constructed did not impose such liability; that the approval of the plan when completed was as much a judicial act as the design of it. *Urquhart v. City of Ogdensburg*. 67
2. Where a municipal corporation omits to act with reasonable diligence after notice of an unlawful obstruction in a street which might occasion injury to persons lawfully thereon, it is no defense to an action for injuries so occasioned that it was not known to the corporation that the obstruction was in fact dangerous. *Rehberg v. Mayor, etc* 137
3. One passing along a sidewalk has a right to presume it to be safe, he is bound to no special care and cannot be charged with negligence for not being on his guard against an unlawful obstruction, or for not looking for it, although it is visible. *McGuire v. Spence*. 303
4. Where a child is injured in consequence of such an obstruction, it is not a defense that the child was playing upon the street, instead of using it for the ordinary purposes of travel; for children to play upon a sidewalk is not unlawful. wrong or negligent. *Id.*
5. S., plaintiff's intestate, was fireman upon an engine drawing a train, "No. 337," going west, on a branch of defendant's road, the business of which was prosecuted over a single track. The train

was known as a "wild cat" train; i. e., one running irregularly, without reference to schedule or the regular trains, and moving by special orders. A regular train, "No. 50," was due at Cayuga, going east, according to schedule, at 4:40 P. M., and would leave at 4:45. Train "337" was then at Auburn, and at 4:46 the superintendent of the road telegraphed from Rochester to its conductor and engineer: "Wild cat to Cayuga regardless of No. 50; 12," the numerals at the end meaning "answer how understood." The rule of defendant in regard to the movement of trains by telegraph required the order to be first copied by the operator at Auburn in an order book and repeated back to the dispatcher, and after receiving back a message "O. K.," said operator was required to copy on a blank for the conductor and engineer, who, after comparing it with the book and seeing it was correct, were required to sign their names in the book prefixed by "13," meaning: "We understand," which numeral with the signatures the operator was required to transmit to the dispatcher, who, thereupon, was to repeat the order. All of this was done, and train "337," according to such order, left Auburn. No communication was sent by the superintendent to the conductor or engineer of train "50" in regard to the movements of train "337," but at 4:10 he telegraphed to K., the operator at Cayuga, to hold "No. 50" for orders, which he received and repeated back. K. said to the conductor of "50": "Hold No. 50 for 61," without exhibiting or delivering any message, and no rule or order of defendant required him to do so. There was a rule that "whenever any agent or operator receives an order to hold any train * * he must carry out the order strictly." "61" was a train going west ahead of "337;" it came in soon after, whereupon "50" started out, and collided with "337," and S. was injured. In an action to recover damages the court submitted to the jury the question whether "the defendant had

omitted the doing of any thing which it ought reasonably to have done to prevent the casualty." *Held* no error; that having ordered "337" to travel on the time of "50," defendant was bound to exercise every reasonable precaution that the latter should not leave Cayuga before the arrival of the former; and that its failure to communicate direct with the conductor and engineer of "50" presented a question for the jury. *Sheehan v. N. Y. C., etc.* 332

6. Although from an infant, if *sui juris*, a less degree of care is required than from a person of mature age, yet he is chargeable with some degree of care and prudence in approaching a known danger, and is responsible for the consequences of some degree of negligence; and in an action for injuries to him occasioned by negligence of another, absence of this degree of negligence on his part must be made to appear to authorize a recovery. *Wendell v. N. Y. C., etc.* 420
7. In an action to recover damages for alleged negligence causing the death of W., plaintiffs' intestate, who was killed at a crossing on the defendant's road, in the city of S., it appeared that the deceased was a bright, active boy seven years of age, considered competent by his parents to go to school and on errands alone. He was in the habit of crossing the railroad tracks at the place where the accident happened; he had been stopped while attempting to cross by the flagmen stationed at that point, and had been before cautioned by them against attempting to cross in front of an approaching train. Shortly before the accident the deceased was standing near the flagman's shanty with a companion, on the street fifty-one feet from where he was struck; the approaching train was in plain sight from the place where he stood for a distance of about five hundred feet from the crossing. The flagmen (two in number) had left the shanty and approached

the track, in the performance of their duty. The boys both started on a run to cross in front of the train; the flagmen shouted to them to stop and waved their flags; one of the flagmen, who stood on the sidewalk ten or fifteen feet distant from the track on which the train was approaching, endeavored to intercept the deceased, but he eluded him and reached the track, where he slipped and fell and was killed. *Held* (DANFORTH, J., dissenting), that a motion for nonsuit on the ground of contributory negligence was improperly denied. *Id.*

8. M., plaintiff's intestate, who was an engineer in defendant's employ, was killed by the collision of the train he was running, with freight cars standing on the track of defendant's road at O. The accident occurred on a dark and foggy night. A freight train was being made up at O. and the main track and switch were both occupied. The usual signal to stop a train was the swinging of a red lantern. In addition, the rules of the company required its flagman on foggy nights to use torpedoes which were provided for that purpose. There were three brakemen upon the freight train, two of them regular brakemen, and one, T., an extra man; it was defendant's custom to keep extra men at O. to supply the place of regular brakemen, sick or absent. T., about a week before the accident, applied to defendant's general train dispatcher for a position as brakeman and was advised that he might get a job at O., to which place he went and reported to the yard-master, and he had prior to the accident made two or three trips as brakeman. He was selected by the conductor of the freight train to take the place of a regular brakeman. The yard-master requested the conductor to send out a flagman to flag the expected train. One of the regular brakemen started to do this, but the conductor directed him to remain and sent T. The latter did not take or use a torpedo, and had not been informed of, and did not know of the rule

requiring such use; he had never flagged a train in the night except the second night before, on which occasion the conductor found fault with, and discharged him for not obeying orders. T. failed to properly signal the approaching train, and this omission occasioned the accident. *Held*, that the evidence justified the submission to the jury of the question as to the negligent performance, by defendant, of the duty it owed to its servants, to use due care in the selection of competent co-servants. *Mann v. Prest., etc., D. & H. C. Co.* 495

— *As to duty of one employing another to make repairs on premises to warn him of a dangerous place, or to guard it.*

See Homer v. Everett (Mem.) 641

NEW YORK (CITY OF).

1. The provision of the charter of New York city of 1873 (§ 91, chap. 335, Laws of 1873) requiring any work undertaken for the city, involving an expenditure of over \$1,000, to be let by contract in the manner specified, was intended as a general rule governing the action of all officers and departments of the city government. *In re Blodgett.* 117
2. The provision of said charter (§ 73) vesting in the department of public works, created by the charter, the powers and functions previously possessed by the old department of public works and by the department of public parks did not preserve to the newly organized department the power formerly possessed by the department of public parks to do the work they were authorized to perform in their discretion by day's work instead of by contract. *Id.*
3. Prior to the passage of said charter, a plan for the drainage of the "Boulevard" throughout its whole extent had been prepared and approved by the proper authorities. The sewers were divided into five sections or districts, each independ-

ent of and entirely disconnected with the others, having a different outlet and capable of being separately constructed without regard to the others. A separate assessment was made for the work in each section. When the charter was adopted some work had been done upon one of the sections. *Held* that this was not work "in progress" upon all the sections within the meaning of the exception in said provision in regard to contracts, exempting such work from the contract system; that the sewerage of the Boulevard was not an entire work but a series of separate improvements, and that, therefore, an assessment for constructing sewers in one of the sections whereon no work had been done prior to the charter, the improvement having been done by day's work not by contract, was illegal and void. *Id.*

4. In an action to recover damages for injuries sustained by plaintiff in consequence of the falling upon him of a pile of brick in one of defendant's streets, it appeared that the bricks were placed in the street without the permission of the city authorities by a contractor engaged in tearing down a building adjoining the street. The pile was constructed in a dangerous manner, without proper braces and was built to an improper height. The pile was commenced a week before the accident and had reached the safety limit as to height four or five days before. The charter of the city (§ 17, sub. 4, chap. 335, Laws of 1873) authorizes the common council to enact laws preventing obstructions to streets, and prohibits obstructions except "the temporary occupation thereof during the erection or repair of a building on a lot opposite the same." The police force of the city are also charged by statute with the duty at all times to remove nuisances existing in the public streets. (§ 29, chap. 403, Laws of 1864.) By a city ordinance the incumbering or obstructing a street without the consent of the mayor or street commissioners is prohibited. A policeman as-

signed to duty in the precinct saw the pile from time to time as it was going up, but it did not appear that he interfered or sought to ascertain whether any permit had been granted, or that he notified any officer or department of the city government of its existence. Plaintiff offered to prove that regulations had been made prescribing the height to which brick might be piled in the streets, under the permission of the proper bureau; this was rejected and plaintiff was nonsuited. *Held* error; that it was to be assumed that regulations had been made, as plaintiff offered to prove, and that the policeman assigned to duty at the place knew of them; that while the policeman might have been justified in supposing that the contractors had a permit, he ought to have known, when the pile exceeded the height which safety permitted, they were not acting within the scope of any authority; that notice to the policeman of the unlawful character of the obstruction was notice to the city and it is chargeable with any neglect on his part; that as to whether there was time for the city, using reasonable diligence, to have removed the obstruction after such notice and before the injury, was a question of fact for the jury. *Rehberg v. Mayor, etc.* 137

5. The Mechanic's Lien Law of 1875, for the city of New York (Chap. 379, Laws of 1875) was not repealed by the lien law of 1880 (Chap. 486, Laws of 1880) for the cities of the State. *McKenna v. Edmundstone.* 231
6. A patrolman is an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (§ 43, chap. 335, Laws of 1873), is incidental to the office, to which, by reason of his title to the office, the incumbent acquires a right. *People, ex rel. Ryan, v. French.* 285
7. While, therefore, such officer may be removed for cause (§ 41), or retired from office for disability incurred in the performance of

- duty (§ 42), he is entitled to his entire salary as long as he possesses the title to the office. *Id.*
8. The authority conferred by said charter (§§ 41, 50), upon the board of police, to provide by rules and regulations for the government of the police department and the discipline of the subordinates under its control, does not give a right to pass rules or regulations making deductions from the salary of a patrolman while detained from duty by reason of sickness or injury caused by the discharge of his official duty. *Id.*
 9. The provision, above mentioned, of said charter (§ 42), authorizing the retirement of a patrolman, was not repealed by the act of 1878 (Chap. 889, Laws of 1878), creating a police pension fund. *Id.*
 10. A continuous practice of the board to make such deductions, however general, cannot control the true construction of the law, or impair the right plainly given thereby. *Id.*
 11. *It seems* that the provision of the act of 1853 in relation to the police department (§ 8, art. 1, chap. 228, Laws of 1853), providing that policemen "absent from duty in consequence of disease, or injuries contracted in public service, shall receive full pay," has not been repealed. *Id.*
 12. The history of legislation in reference to the police force of said city given and the various statutes collated. *Id.*
 13. The provision of the act "to alter the map or plan of certain portions of the city of New York" (Chap. 697, Laws of 1867), which authorizes the payment of damages caused by the closing of "any street, avenue or road laid out on the map of the city of New York within the district specified," was not confined to the streets and avenues laid out by commissioners under the act of 1807 (Chap. 116, Laws of 1807), but included any road exhibited upon the map filed by said commissioners. *In re Barclay.* 430
 14. Accordingly *held*, that the owners of property fronting on the old "Bloomingdale road" were entitled to compensation for the closing thereof. *Id.*
 15. Also *held*, that by incorporating into said act of 1867 the provisions of the act of 1852 (§ 8, chap. 52, Laws of 1852), providing for the payment of damages by assessment upon the property benefited, it was the intention of the legislature to make the damages caused by the closing of said road payable by assessment, as so provided; and that, therefore, an assessment for that purpose was valid. *Id.*
 16. The statutes in relation to the assessment of taxes in the city and county of New York (Chap. 302, Laws of 1859; § 4, chap. 410, Laws of 1867; § 112, chap. 335, Laws of 1873), confer no power upon the commissioners of taxes and assessments to change the record of assessments after the first day of June in any year. *People, ex rel. 23d St. R. R. Co., v. Comm'rs of Taxes.* 593
 17. *It seems* that none of the municipal authorities have any judicial duty to perform after that date, in relation to the assessment of property, or the collection of taxes, save the board of supervisors, and they only when it appears "under oath or affirmation that the party aggrieved was unable to attend within the period prescribed for the correction of taxes by reason of sickness or absence from the city" (§ 10, chap. 302, Laws of 1859). *Id.*
 18. As, therefore, the act of 1880 (Chap. 542, Laws of 1880), providing for the taxation of certain corporations, companies and associations, was not passed until June first of that year, and as it contains no provisions giving it a retroactive effect, or providing for the contingency, it imposed no duty upon said commissioners, so far as the assessment and collec-

tion of taxes for that year were concerned. *Id.*

NEW YORK (COUNTY OF).

The repeal by the act of 1880 (Chap. 245, Laws of 1880) of the act of 1870 (Chap. 359, Laws of 1870) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the repealing act took effect. *In re Estate of Weston.* 502

OFFICE AND OFFICER.

A patrolman is an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (§ 43, chap. 335, Laws of 1873), is incidental to the office, to which, by reason of his title to the office, the incumbent acquires a right. *People, ex rel. Ryan, v. French.* 265

— A construction given to the provision of the Code of Civil Procedure (§ 1421), providing where action is brought against officer to recover chattels levied on by execution or attachment, if bond of indemnity has been given him that the obligor may be substituted as defendant, and its effect stated.

See *Hessberg v. Riley.* 377

See ELECTION OF OFFICERS.

PARTIES.

1. Where by a policy of insurance issued to the owner of mortgaged property, the loss, if any, is made payable to the mortgagee to the extent of his mortgage interest, the owner and the mortgagee may properly be joined as plaintiffs in an action upon the policy. *Winne v. Nia. F. Ins. Co.* 185

2. The defendant appeared herein by attorney; issue was joined which was regularly brought on for trial

on notice, and the defendant's attorney not appearing, the trial proceeded as upon default. B., the original plaintiff, was examined as a witness. The default was, on application of defendant, set aside and a new trial granted. Upon the second trial, the minutes of the testimony of B. given on the first trial, he having died in the meantime, were offered in evidence and rejected on the ground that defendant had no opportunity to cross-examine the witness. *Held*, error; that the evidence was competent, both at common law and under the Code of Civil Procedure (§ 830); and that as defendant had the power to appear and cross-examine his failure so to do was a waiver of that privilege. *Bradley v. Mirick.* 293

3. Under the provision of the Code of Civil Procedure (§ 1421) providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon. *Hessberg v. Riley.* 377

4. Upon motion for such substitution the plaintiff may not be heard to object, that notice of the motion was not served upon the officer who made the levy, as he does not represent that officer. *Id.*

5. *It seems* that the motion being made for the benefit of the officer it is to be presumed that he has notice; and, when he does not object, that he assents to the proceeding. *Id.*

6. The amount claimed in such an action was \$2,000; the undertaking was for \$1,000. *Held*, that it was a matter in the discretion of the

court below whether to require additional security and that the difference did not authorize a refusal of a motion to substitute the sureties. *Id.*

7. Where a provision is contained in the assignment of a bond and mortgage, guaranteeing its payment "by due foreclosure and sale," the guarantor, although conditionally liable only, was prior to the adoption of the Code of Civil Procedure, by force of the statute (2 R. S. 191, §§ 153, 154) properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency is proper. *Vanderbilt v. Schreyer.* 392

— Only a party aggrieved may institute proceedings to compel new election of directors of a corporation. See *In re Syr. C. & N. Y. R. R. Co.* 1

— When evidence of party as to nature of transaction incompetent under § 829 of the Code of Civil Procedure. See *Koehler v. Adler.* (Mem.) 657

PARTNERSHIP.

1. By an agreement between co-partners engaged in the business of banking, each of whom contributed to the capital of the firm, it was stipulated that each partner should be allowed six and one-half per cent per annum on the average amount of his deposits, and if either should overdraw his account, he should pay interest on the average of such overdrafts at the rate of ten per cent per annum during the continuance of the partnership. F, one of the partners, overdraw his account, and gave to plaintiff, as trustee for the firm, his bond and mortgage for the balance against him, as shown by the partnership books, interest being charged against him as stipulated. The co-partnership was dissolved by the death of F. In an action to foreclose the mortgage, wherein the defense was usury, the trial court found that the agreement was

not a device to evade the usury law. *Held*, that the overdrafts were not usurious loans, that the agreement was in effect simply that the partner withdrawing funds should make a contribution to profits equal to the estimated earning power of the capital withdrawn, and so was valid. *Payne v. Freer.* 48

2. When the partnership was formed there were certain notes outstanding indorsed by F. and which, as between him and the makers, were for him to pay; these were taken up by the firm, and were renewed from time to time, the interest being charged to the account of F. at the stipulated rate, and the advances to take up the notes were finally also charged. *Held*, that these advances were overdrafts within the meaning of the partnership agreement and were not usurious. *Id.*

— A firm not estopped by statements of one of its members in deposition, proving as his own a debt in bankruptcy, once owned by the firm. See *Meltzer v. Doll.* 365

PATENTS (FOR LANDS).

Certain letters patent executed by the colonial government of the Colony of New York, the first of which bears date November 30, 1666, granted to the freeholders of the town of H. Long Island, a tract of land described by metes and bounds, together with all "havens, harbors, * * * fishing," etc., within the specified limits. The north boundary is "the sound running betwixt Long Island and the maine." Within the east and west bounds of the patents lies Northport harbor, a land-locked harbor; Eaton's Neck, and Eaton's Neck beach, lying between it and the waters of the sound. *Held*, that said harbor was included in the grant, and the same having been confirmed by act of the colonial legislature (Act of May, 1691; 1 Bradford's Laws 77), the title of land under the waters of the har-

bor was thereby vested in the town, together with the exclusive right to oyster fishing therein. *Robins v. Ackertly.* 98

plaintiff to full costs when judgment is less than \$50.

See Langdon v. Guy. (Mem.) 660

PLEADING*

An official bond given by B., upon his appointment as cashier of a bank, was conditioned "that he shall honestly and faithfully discharge the duties of such cashier, rendering at all times his undivided care and services to said bank, and shall obey the orders and directions of the president and directors of said bank lawfully given, and shall at all times account for and pay over all moneys * * * belonging to said bank, and shall keep true and accurate books," etc. The complaint in an action upon the bond, after averring specifically non-performance of each and all of the conditions alleged, that on the contrary thereof B. paid out the moneys of the bank fraudulently to various persons without any sufficient vouchers or security therefor, and fraudulently permitted various persons to overdraw their accounts without any security, and fraudulently altered and falsified the accounts and books of the bank so as to conceal such frauds, and has refused to pay over to the president and directors large sums of money, to wit: \$100,000. *Held*, that these allegations were a sufficient compliance with the provision of the Revised Statutes (2 R. S. 378, § 5), providing that in an action for the breach of a condition of a bond other than for the payment of money, the "declaration shall assign the specific breaches for which the action is brought;" also that if insufficient no reason was thereby furnished for a dismissal of the complaint, as defendant could have applied by motion to have them made more definite and certain, or for a bill of particulars. *Bostwick v. Van Voorhis.* 353

— *When title to land not brought in question by pleadings in action for assault and battery so as to entitle*

POLICE.

1. A patrolman is an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (§ 43, chap. 385, Laws of 1873), is incidental to the office, to which, by reason of his title to the office, the incumbent acquires a right. *People, ex rel. Ryan, v. French.* 265
2. While, therefore, such officer may be removed for cause (§ 41), or retired from office for disability incurred in the performance of duty (§ 42), he is entitled to his entire salary as long as he possesses the title to the office. *Id.*
3. The authority conferred by said charter (§§ 41, 50), upon the board of police, to provide by rules and regulations for the government of the police department and the discipline of the subordinates under its control, does not give a right to pass rules or regulations making deductions from the salary of a patrolman while detained from duty by reason of sickness or injury caused by the discharge of his official duty. *Id.*
4. The provision above mentioned, of said charter (§ 42), authorizing the retirement of a patrolman, was not repealed by the act of 1878 (Chap. 389, Laws of 1878), creating a police pension fund. *Id.*
5. A continuous practice of the board to make such deductions, however general, cannot control the true construction of the law, or impair the right plainly given thereby. *Id.*
6. *It seems* that the provision of the act of 1853 in relation to the police department (§ 8, art. 1, chap. 228, Laws of 1853), providing that policemen "absent from duty in consequence of disease, or injuries contracted in public service, shall

receive full pay," has not been repealed. *Id.*

7. The history of legislation in reference to the police force of said city given and the various statutes collated. *Id.*

— *Provisions of charter of city of Troy in reference to election of police commissioners construed.*
See People, ex rel. v. Crissey. 616

PRACTICE.

1. When a preference is claimed on the calendar of this court, under the provision of the Code of Civil Procedure (§ 791, subd. 7), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or judge thereof upon notice to the adverse party" (§ 793). *Bk of Attica v. Met. Nat. Bk.* 239
2. It is no excuse for a failure to procure the order that there was no term of the court at which a motion for the order could be made. Such a motion may be made on notice before any judge of the court, at his residence or office, or at any place which the judge, on application of the moving party, may name. *Id.*
3. Under the provision of the act of 1870 (Chap. 78, Laws of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the in-

terest. *Manning v. Pt. H. Iron Ore Co.* 664

4. *It seems* that the remedy of the defendant in such case, if any, is to move to set aside the verdict. *Id.*

See CRIMINAL TRIAL.
 PLEADING.
 TRIAL.

PRESUMPTIONS.

1. In an action upon an alleged contract of insurance it appeared that F., a general agent of the defendant, authorized to bind the company by his contracts in the first instance, had insured a building on property belonging to plaintiff H. W. W., for several years to the amount of \$2,000, the policies being each for one year. The last policy expired July 1, 1876. Defendant, in accordance with its usual custom, sent to F., in June preceding, a paper called an "expiration sheet," showing the policies expiring in July; opposite the policy in question was written the word "drop." Thereupon F. agreed to reinsure the building for \$1,000. A policy was written by F. who directed it to be reported to defendant and it was entered by his clerk in the register of completed contracts, but before delivery the building was burned. F. had been accustomed to give the insured credit for premiums and to hold the policies until called for. *Held*, that the circumstances authorized an inference that the parties intended the new policy to be for the same time and at the same rate of premium as the policy which had just expired, the two differing only in amount; that, therefore, a finding that the minds of the parties met and a completed contract of insurance was entered into was justified. *Winns v. Nia. F. Ins. Co.* 185
2. The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest known to the law, especially

in cases involving legitimacy. Where there is enough to create a foundation for the presumption, it can be repelled only by the most cogent and satisfactory evidence. *Hynes v. McDermott.* 451

3. Where a will executed by one having full testamentary capacity, and duly admitted to probate, contained a legacy to the draughtsman, an attorney, who, at the time of the execution of the will, was, and for a long time previous had been, the counsel of the testator, *held*, that this alone did not raise a presumption, in aid of one seeking to overthrow the will, that the influence of the attorney was unduly exercised, nor did it, in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled; that it was for the plaintiff, therefore, in an action brought to set aside the will to give some other evidence tending to show fraud or undue influence. *Post v. Mason.* 539

— Where attestation clause to will is in due form presumption is in favor of due execution. *See In re Pepoon.* 255

PRINCIPAL AND AGENT.

1. Where a registered policy life insurance company which has entered into a contract with a general agent for his services for a specified term at a stipulated salary, before any breach of the contract on its part, is restrained from further prosecuting its business or exercising its corporate franchises by order of the court, and a receiver of its assets is appointed in proceedings under the insurance law (§ 7, chap. 902, Laws of 1869), the agent has no valid claim upon the fund in the hands of the receiver for damages for alleged breach of the contract, because of the discontinuance of the employment; at least, in the absence of evidence that it was some fault of the company which induced the superintendent of the insurance

department to make the certificate upon which the attorney-general acted. There is, in such case, no breach on the part of the company as performance is prevented, and the contract dissolved by the action of the State. *People v. Globe Mut. L. Ins. Co.* 174

2. The difference between the position of agents and that of policyholders pointed out. *Id.*
3. Where a letter of instructions from a principal to his agent is equivocal, and fairly susceptible of different interpretations, and the agent in fact is misled, and adopts and follows one while his principal intended another, the latter is bound and the agent exonerated. *Winne v. Nia. F. Ins. Co.* 185
4. M. & Co., who were brokers and agents for H., having authority from her to pledge certain stocks belonging to her for a loan of \$35,000, made a contract with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for H., and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. In an action for an alleged conversion of the said stocks defendant claimed the right to hold the same as security for other loans made by it to M. & Co. *Held* untenable; that defendant had no right to assume that M. & Co. had authority to make other loans, at least, in the absence of any statement that the subsequent loans were made for the benefit of H., and this although M. & Co. had a power of attorney absolute on its face. *Talmage v. Third Nat. B'k.* 531
5. Plaintiff tendered, before suit was brought, the \$35,000 and interest, and on this being refused tendered \$46,000. *Held*, that this was not conclusive as an admission that defendant had a lien for the latter sum; and that defendant was not entitled to a deduction of that amount from the value of the

stocks, but only of the amount of its lien. *Id.*

See BROKER.
FACTOR.

PRINCIPAL AND SURETY.

1. One of three makers of a joint and several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note *held* that these facts did not show an authority conferred upon the principal to make a payment as the agent of the surety, so as to take the case as to the latter out of the statute of limitations; also that they failed to establish a ratification of the payment. *Littlefield v. Littlefield.* 208

2. Where the contract of a surety is not an absolute guaranty of payment of a debt of his principal, but simply an undertaking of such a nature that proceedings must be taken against the debtor before the obligation of the surety to pay arises, the law implies a condition on the part of the creditor that due diligence shall be used in proceeding against the principal; and to establish a defense based on a breach of this condition, it is not necessary for the surety to show a request on his part to the creditor to proceed, and damage resulting to him from a failure to comply. *Toles v. Adee.* 563

3. In 1867, S., defendant's testator, for the purpose of procuring the discharge of A. from arrest, under an order of arrest issued in an action brought against him by plaintiff, executed an undertaking to the effect that A. would at all times hold himself amenable to process issued to enforce the judgment. In July, 1868, plaintiff obtained judg-

ment. A. remained within the jurisdiction of the court until December, 1868, when he left the State; he returned in February, 1869, to his former home and remained about a month. S. died in 1870. A. returned again to the State in June, 1871, where he remained, openly visiting in plaintiff's neighborhood for five or six weeks. Plaintiff did not enter judgment until April 21, 1874; execution was issued thereon against the property of A. on April 23, which was returned unsatisfied, and on May 4, 1874, an execution against the person was issued and returned not found. In an action upon the undertaking defendant gave evidence to the effect that in October, 1868, and in June, 1871, notice to proceed was given to plaintiff's attorneys. The court submitted to the jury the question as to whether plaintiff's delay in entering judgment and issuing process had injured or impaired the rights of the surety, charging in substance, that if no injury had resulted therefrom, plaintiff was entitled to recover. *Held* error, that the entry of judgment and issuing of process against the testator's principal were conditions precedent to the liability of the surety, that a neglect to perform such conditions with due diligence discharged the surety; and that the facts conclusively established *laches.* *Id.*

4. Also *held*, that conceding it to have been necessary for the defense to prove injury to the surety by the delay, such impairment and injury were conclusively established, and the submission of the question to the jury was error. *Id.*

5. The distinction between the case of a surety absolutely liable, and one whose liability depends upon the performance of conditions precedent pointed out. *Id.*

6. Evidence was given on the part of the plaintiff that in August, 1868, S. requested plaintiff not to proceed further in the action. *Held*, that assuming this to have been established, the request could not be deemed to continue after the

death of S., and even without any request upon the part of the defendants, his executors, if plaintiff desired to hold the estate responsible, it then became her duty to use due diligence, which she failed to do. *Id.*

— *Liability of sureties upon bond given by cashier of bank upon his appointment.*

See Bostwick v. Van Voorhis. 353

PROPERTY.

Negotiable bonds of a municipal corporation, complete in form and capable of becoming effective instruments in the hands of a *bona fide* holder are, although unissued, "property" within the meaning of the act (Chap. 19, Laws of 1875), providing for the punishment of speculation of public moneys and property. *Bork v. People.* 5

PUBLIC POLICY

Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note *held*, that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy. *Adams v. Adams.* 381

QUESTIONS OF LAW AND FACT.

— *Negligence, when question of fact.*

See Mann v. President, etc., D. & H. C. Co. 495

RAILROAD CORPORATIONS.

1. A horse railroad constructed under legislative authority on the surface of the street of a city is not an unlawful interference with

the rights of the abutting owner, but is a street use consistent with such rights. *Mahady v. Bushwick R. R. Co.* 148

2. An unreasonable use of the street, however, by the railroad company, such as using a switch or siding thereon for the storing and deposit of its cars to the injury of an adjoining owner, gives a right of action to the latter for the special injury. *Id.*

3. Plaintiff's complaint alleged in substance, that defendant without lawful authority constructed a siding upon a street in the city of B. opposite plaintiff's premises; he claimed special damage caused by the occupation of the siding as a stand for its cars, cutting off access to plaintiff's lots, etc., and an injunction was asked restraining defendant from the use of the siding for its cars. The court impaneled a jury to assess the damages, reserving the question of law. The jury were instructed that in assessing the damages they were to assume that the siding was constructed without lawful right, and to take into consideration the annoyance plaintiff and his family had suffered. This was duly excepted to on the ground that the road was authorized by the common council of the city. The court subsequently directed judgment for the damages assessed and for an injunction restraining the use of the siding as a stand for cars, having decided against the plaintiff on the issue as to the lawfulness of the siding, and basing its decision on the ground of unreasonable use. *Held*, that the charge was erroneous, as plaintiff was only entitled to the special damages caused by the improper use of the siding; and that defendant was entitled to a new trial. *Id.*

4. S., plaintiff's intestate, was fireman upon an engine drawing a train, "No. 387," going west, on a branch of defendant's road, the business of which was prosecuted over a single track. The train was known as a "wild cat" train; i. e., one running irregularly, without

reference to schedule or the regular trains, and moving by special orders. A regular train, "No. 50," was due at Cayuga, going east, according to schedule, at 4:40 P. M., and would leave at 4:45. Train "837" was then at Auburn, and at 4:46 the superintendent of the road telegraphed from Rochester to its conductor and engineer: "Wild cat to Cayuga regardless of No. 50; 12," the numerals at the end meaning "answer how understood." The rule of defendant in regard to the movement of trains by telegraph required the order to be first copied by the operator at Auburn in an order book and repeated back to the dispatcher, and after receiving back a message "O. K.," said operator was required to copy on a blank for the conductor and engineer, who, after comparing it with the book and seeing it was correct, were required to sign their names in the book prefixed by "13," meaning, "We understand," which numeral with the signatures the operator was required to transmit to the dispatcher, who, thereupon, was to repeat the order. All of this was done, and train "837," according to such order, left Auburn. No communication was sent by the superintendent to the conductor or engineer of train "50" in regard to the movements of train "837," but at 4:10 he telegraphed to K., the operator at Cayuga, to hold "No. 50" for orders which he received and repeated back. K. said to the conductor of "50:" "Hold No. 50 for 61," without exhibiting or delivering any message, and no rule or order of defendant required him to do so. There was a rule that "whenever any agent or operator receives an order to hold any train * * he must carry out the order strictly." "61" was a train going west ahead of "837;" it came in soon after, whereupon "50" started out, and collided with "837," and S. was injured. In an action to recover damages the court submitted to the jury the question whether "the defendant had omitted the doing of any thing which it ought reasonably to have done to prevent the casualty." *Held* no error; that having ordered "837"

to travel on the time of "50," defendant was bound to exercise every reasonable precaution that the latter should not leave Cayuga before the arrival of the former; and that its failure to communicate direct with the conductor and engineer of "50" presented a question for the jury. *Sheehan v. N. Y. C., etc.* 382

5. In an action to recover damages for alleged negligence causing the death of W., plaintiff's intestate, who was killed at a crossing on the defendant's road, in the city of S., it appeared that the deceased was a bright, active boy, seven years of age, considered competent by his parents to go to school and on errands alone. He was in the habit of crossing the railroad tracks at the place where the accident happened; he had been stopped while attempting to cross by the flagmen stationed at that point, and had been before cautioned by them against attempting to cross in front of an approaching train. Shortly before the accident the deceased was standing near the flagman's shanty with a companion, on the street fifty-one feet from where he was struck; the approaching train was in plain sight from the place where he stood for a distance of about five hundred feet from the crossing. The flagmen (two in number) had left the shanty and approached the track, in the performance of their duty. The boys both started on a run to cross in front of the train; the flagmen shouted to them to stop and waved their flags; one of the flagmen who stood on the sidewalk ten or fifteen feet distant from the track on which the train was approaching, endeavored to intercept the deceased, but he eluded him and reached the track, where he slipped and fell and was killed. *Held* (DANFORTH, J., dissenting), that a motion for nonsuit on the ground of contributory negligence was improperly denied. *Wendell v. N. Y. C., etc.* 420
6. M., plaintiff's intestate, who was an engineer in defendant's employ, was killed by the collision of the

train he was running with freight cars standing on the track of defendant's road at O. The accident occurred on a dark and foggy night. A freight train was being made up at O. and the main track and switch were both occupied. The usual signal to stop a train was the swinging of a red lantern. In addition, the rules of the company required its flagman on foggy nights to use torpedoes which were provided for that purpose. There were three brakemen upon the freight train, two of them regular brakemen, and one, T., an extra man; it was defendant's custom to keep extra men at O. to supply the place of regular brakemen, sick or absent. T., about a week before the accident, applied to defendant's general train dispatcher for a position as brakeman and was advised that he might get a job at O., to which place he went and reported to the yard-master, and he had prior to the accident made two or three trips as brakeman. He was selected by the conductor of the freight train to take the place of a regular brakeman. The yard-master requested the conductor to send out a flagman to flag the expected train. One of the regular brakemen started to do this, but the conductor directed him to remain and sent T. The latter did not take or use a torpedo, and had not been informed of, and did not know of the rule requiring such use; he had never flagged a train in the night except the second night before, on which occasion the conductor found fault with, and discharged him for not obeying orders. T. failed to properly signal the approaching train, and this omission occasioned the accident. *Held*, that the evidence justified the submission to the jury of the question as to the negligent performance, by defendant, of the duty it owed to its servants, to use due care in the selection of competent co-servants. *Mann v. Prest., etc., D. & H. C. Co.* 495

7. Where a railroad corporation, by proceedings under the General Railroad Act (§ 17, chap. 282, Laws of 1854), acquired title to

lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, putting in issue the necessity of the taking of all the lands sought to be condemned, *held*, that it was not open for the officials of the town to question, collaterally, the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway. *P. P. & C. I. R. R. Co. v. Williamson.* 553

8. In an action by railroad corporation to restrain the highway commissioners of the town from opening a highway over the lands so acquired it appeared that plaintiff's railroad was constructed simply as an excursion road, for the conveyance of passengers to the sea beach. The land acquired consisted of several acres lying at the terminus of the railroad, on the sea shore. The corporation erected thereon a depot, waiting-room, car-houses, restaurant, track yard and other structures used in the actual operation of the road, leaving a space between the depot building and the beach of about seven hundred feet in length, across which the highway was sought to be laid out; this was occupied by railroad tracks running to high-water mark, plank walks for passengers, and by various structures for their accommodation, convenience and pleasure. During the summer season plaintiff conveys, daily, from ten to fifteen thousand people each way over its road, and runs about one hundred and twenty passenger trains per day. It also appeared that the strip of land was, at times, insufficient for the use of passengers, and was so crowded with people that it was difficult to walk across it; that the proposed highway would deprive the plaintiff of a large part of this area, and would expose its passengers, a large portion of whom were women and children, to danger from passing vehicles. *Held*, that a finding that the laying out of the highway would not interfere with the property occupied by the company for

railroad purposes, or cause damage to its business, was not justified; that the erection on the land of decorations and structures for amusement, although they might be deemed superfluous, was not an abandonment by the company of the uses for which it acquired the premises. *Id.*

9. *It seems* that if the purposes for which the structures upon the land were used were so foreign to the purpose for which it was acquired, or so reprehensible as to produce a forfeiture of the rights of the company, it did not lie with the highway commissioners to enforce it. *Id.*

10. The authority given by the General Railroad Act (§ 1, chap. 62, Laws of 1853) to construct highways across railroad tracks does not extend to lands taken for depot purposes. *Id.*

11. *It seems* that where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors. *Harpending v. Munson.* 650

12. *It seems*, also, that a director of a railroad corporation may properly own its bonds secured by mortgage executed by it, and may enforce payment in case of default by foreclosure. *Id.*

13. *It seems*, also, that where a director so owning bonds of the company becomes the purchaser on foreclosure, an action cannot be maintained to impress a trust upon the property for the benefit of stockholders, because of fraudulent conduct on the part of the director in procuring the default which caused the foreclosure, at least without paying or offering to

pay to him the amount of the bonds. The equity of the stockholders, if any, is only in the surplus after payment of the bonded debt, and the action would be in effect a bill to redeem. *Id.*

RATIFICATION.

One of three makers of a joint and several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note *held* that these facts failed to establish a ratification of the payment by the surety, so as to take the case as to him out of the statute of limitations. *Littlefield v. Littlefield.* 208

RECEIVER.

A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act (§ 10, chap. 40, Laws of 1848) to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by these in their own right and for their own especial benefit. *Farnsworth v. Wood.* 308

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RELEASE.

A purchase by and conveyance to a mortgagee of an undivided part of

the mortgaged premises, where it does not appear that there was a payment or merger of the mortgage, or any portion thereof, operates as a release of the portion conveyed from the lien of the mortgage, leaving it to rest solely upon the portion unconveyed. *Smith v. Roberts.* 470

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SAVINGS BANKS.

U., plaintiff's intestate, in 1850 deposited a sum of money in a savings bank, which was credited to an account then opened with her, in trust for S. J. U., her daughter. The bank issued a pass-book, in which the account was entered, as with her, in trust for her said daughter. This deposit was subsequently drawn out. In 1874, U., having sold a house and lot, deposited \$2,000 to the credit of said account, which was entered in said pass-book. She also, at the same time, deposited \$25 to the credit of an account, with her in trust, for a grand-daughter, receiving another pass-book therefor, and on the same day she deposited the balance of the purchase-money received to her own credit, in another savings bank. U. retained the pass-book until her death. In an action to determine the title to the deposit, *held*, that the transaction disclosed an intention to create a trust for the benefit of the daughter; and that the latter was entitled to the fund. *Willis v. Smyth.* 297.

SET-OFF.

1. H., who was the consignee and agent of a manufacturing corporation for the sale of its manufactures, under an agreement by which he was to make advances to the company on goods consigned, and reimburse himself out of the proceeds of sales, sold certain of the goods to defendant in his own

name, upon which he had made advances to more than their value. In an action to recover the purchase-price, defendants sought to set off an account against the company, which had become insolvent, for goods sold by them to it. *Held*, that defendants were not entitled to the set-off. *Young v. Thurber.* 388

2. After defendants had sold to the corporation a portion of the goods for which the set-off was claimed they requested H. to consent that the purchases of the company be charged to his account; this he refused, but stated that when defendants' account should fall due, he would accept the company's draft for the amount. *Held*, that this could not be construed as an agreement to allow the set-off; that it was simply a voluntary promise to accept, and if enforceable on the ground that goods were delivered on the faith of it, could be enforced only according to its terms, and as defendants never obtained or attempted to obtain such a draft, defendants had acquired no rights under it. *Id.*

SLANDER.

1. The complaint herein charged the speaking of alleged slanderous words, which were substantially that plaintiff was offering for sale to a cheese factory, the milk of his dairy which was poisonous and impure, by reason of his suffering a horse having a sore upon its neck, discharging filthy and impure matter, to run in the pasture with his cows, and drink from the same water and share the same food. Defendant claimed upon the trial upon the testimony of experts called by him, that the necessary consequence of the facts stated was to render the milk impure and poisonous. *Held*, that assuming this to be true, the words charged a misdemeanor (§§ 1, 2, chap. 544, Laws of 1864), and were actionable *per se*. *Brooks v. Harrison.* 83

2. It appeared that three different

cheese factories refused plaintiff's milk, assigning as a reason the charge made by defendant. *Held*, that assuming the words were not actionable *per se*, there was sufficient evidence of special damage to authorize the submission of the question to the jury. *Id.*

8. The court charged in substance that if the jury found the alleged wrong to have been malicious and intentional, they could give exemplary damages, in determining which they might consider the injury to plaintiff's feelings and have respect to the force of example. *Held* no error. *Id.*

STATUTES.

1. The rule that a general statute does not repeal a former statute upon the same subject, but limited in its application to a particular locality, unless the two statutes are inconsistent and cannot both stand, or unless the intent to repeal is manifested in the general act, applies, although the more general statute does not embrace the whole territory of the State. *McKenna v. Edmundstone*. 231
2. In construing a statute its title is a legitimate subject of consideration in determining the legislative intent. *People, ex rel. W. F. Ins. Co., v. Davenport*. 574
3. When the language of a statute, if applied in its literal sense, will lead to an absurdity or manifest injustice, it is the duty of the court to limit and restrict its operation. *Id.*
4. Exemption from taxation is not favored by the courts, and unless the language of a statute is so clear and unambiguous that the intention of the legislature to create the exemption indisputably appears, such a construction will not be given to it. *Id.*
5. The authorities upon this subject collated. *Id.*
6. While, when in an amendatory

statute there appears a radical change in the phraseology, it is generally to be regarded as a legislative construction that the law so amended did not, as originally framed, embrace the amended provisions; the time and the circumstances under which the amendment was enacted are to be regarded in considering its effect. If the amendment follows soon after the original act and after controversies have arisen as to its construction because of the use of doubtful phraseology therein, the amendatory act may be construed as in effect declaratory of the object and intent of the prior legislation. *Id.*

7. A declaratory act, although it has no conclusive force in the construction of the prior statute, yet is entitled to consideration and weight. *Id.*

— 1 R. S. 603, § 5.
See In re S. C. & N. Y. R. R. Co., 1.
 — Chap. 19, *Laws of 1875*.
See Bork v. People, 5.
 — Chap. 544, *Laws of 1864*.
See Brooks v. Harrison, 83.
 — Chap. 335, *Laws of 1873*.
See In re Blodgett, 117.
 — Chap. 335, *Laws of 1873*.
 — Chap. 403, *Laws of 1864*.
See Rehberg v. Mayor, 137.
 — Chap. 902, *Laws of 1869*.
See People v. G. M. L. Ins. Co., 174.
 — Chap. 644, *Laws of 1873*.
See People v. Majors, 211.
 — Chap. 379, *Laws of 1875*.
 — Chap. 436, *Laws of 1880*.
See McKenna v. Edmundstone, 231.
 — Chap. 360, *Laws of 1882*.
 — 2 R. S. 701, § 23.
See People v. McGloin, 241.
 — 2 R. S. 63, § 40.
See In re Hewitt, 261.
 — Chap. 335, *Laws of 1873*.
 — Chap. 339, *Laws of 1873*.
 — Chap. 228, *Laws of 1853*.
See People, ex rel. v. French, 265.
 — Chap. 40, *Laws of 1848*.
See Farnsworth v. Wood, 308.
 — 1 R. S. 754, § 19.
See Miller v. Miller, 315.
 — Chap. 40, *Laws of 1848*.
See Veeder v. Judson, 374.
 — 2 R. S. 191, §§ 153, 154.
See Vanderbilt v. Schreyer, 392.

- *Chap. 697, Laws of 1867.*
- *Chap. 115, Laws of 1867.*
- *Chap. 52, Laws of 1852.*
- See In re Barclay, 430.*
- *Chap. 245, Laws of 1880.*
- *Chap. 359, Laws of 1870.*
- See In re Weston, 502.*
- *2 R. S. 63, § 40.*
- See In re O'Neil, 516.*
- *1 R. S. 772, § 8.*
- *Chap. 430, Laws of 1837.*
- See Buckingham v. Corning, 525.*
- *2 R. S. 61, § 29.*
- See Post v. Mason, 539.*
- *Chap. 282, Laws of 1854.*
- *Chap. 62, Laws of 1853.*
- See P. P. & C. I. R. R. Co. v. Williamson, 552.*
- *Chap. 110, Laws of 1880.*
- *Chap. 542, Laws of 1880.*
- *Chap. 361, Laws of 1881.*
- See People, ex rel. v. Davenport, 574.*
- *Chap. 302, Laws of 1850.*
- *Chap. 410, Laws of 1867.*
- *Chap. 335, Laws of 1873.*
- *Chap. 542, Laws of 1880.*
- *Chap. 269, Laws of 1880.*
- See People, ex rel. v. Comm'rs, etc., 593.*
- *Chap. 131, Laws of 1816.*
- *Chap. 101, Laws of 1855.*
- *Chap. 30, Laws of 1880.*
- *Chap. 598, Laws of 1870.*
- *Chap. 293, Laws of 1854.*
- *Chap. 76, Laws of 1881.*
- See People, ex rel. v. Orissey, 616.*
- *Chap. 78, Laws of 1870.*
- See Manning v. P. H. I. O. Co., 664.*
- *Chap. 80, Laws of 1870.*
- *Chap. 223, Laws of 1875.*
- See People, ex rel. v. Supervisors, 672.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCK.

1. Where a dividend upon its stock is declared by a corporation it belongs to the holders of the stock at the time of the declaration, without regard to the source from which, or the time during which, the funds divided were acquired by the corporation. *Jermain v. L. S. & M. S. R. Co.* 483

2. In 1857 the M. S. & N. I. R. R. Co., to whose rights and obligations defendant succeeded, issued certain preferred and guaranteed stock, the same being entitled to annual dividends of ten per cent, payable out of the net earnings of the company, and also to share *pro rata* with the common stock in any surplus. No dividends were paid upon said stock until 1863. Subsequently dividends were regularly declared and paid thereon at the rate specified, and dividends were declared and paid upon the common stock. The arrears of dividends on the preferred stock were not paid, and no dividend has been declared or funds set apart by defendant to pay the same. In 1870 forty shares of said preferred stock were purchased by and transferred to plaintiff, and defendant issued to him a certificate therefor. In an action to compel defendant to declare and pay the dividends in arrears, *held*, that the guaranty related to and was an incident of the stock and passed with it upon assignment thereof; that although the guaranteed dividends became due in 1864, and payment thereof could have been enforced by the holder of the stock, yet as no part of the net earnings were set apart to pay the same, but, on the contrary, were otherwise appropriated, the dividends remained payable to the holder, and an assignment of the stock carried with it the right to receive and recover said dividends; and that, therefore, plaintiff was entitled to maintain the action. *Id.*

STOCKBROKER.

See BROKER.

STOCKHOLDERS.

- A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act (§ 10, chap. 40, Laws of 1848) to creditors of the corporation against the stockholders thereof. The liability of the stockholders does not exist in

favor of the corporation itself or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by these in their own right and for their own especial benefits. *Farnsworth v. Wood.* 308

— *In action against stockholders of a manufacturing corporation to enforce liability to creditor the county treasurer was directed to docket judgment against defendants for maximum liability, and to collect by execution enough to pay claims of creditors with costs, and out of proceeds to retain his lawful commissions. Held, that said commissions were not taxable as an item of plaintiff's disbursements.*

See Veeder v. Judson. 374.

STREETS.

See HIGHWAYS.

SUMMONS.

— *Voluntary general appearance equivalent to personal service of summons within provision of Code of Civil Procedure, (§ 638), requiring summons to be served within thirty days after granting an attachment.*

See Catlin v. Ricketts. 668

SUNDAYS.

— *Allowance for taking care of armories on Sunday proper, under Military Code.*

See People, ex rel. v. Supervisors. 672

SUPERVISORS (BOARD OF).

1. Under the provisions of the Military Code (§§ 124, 125, chap. 80, Laws of 1870, as amended by chap. 223, Laws of 1875) authorizing the commanding officer of each regiment, etc., to appoint a person to take charge of the armory, whose compensation, within the prescribed limits as certified by the commanding officer, shall be a

county charge, the board of supervisors of the county has no jurisdiction to audit or review the amount of compensation so certified, the board has no other duty in reference thereto, except to cause the amount to be levied, collected and paid like other county charges. *People, ex rel. Archambault, v. B'd Sup'rs.* 672

2. An allowance for Sundays necessarily employed in caring for the armory is not prohibited or condemned by any statute, and the supervisors have no authority to deduct such an allowance. *Id.*

SURROGATE'S COURT.

1. Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code, §§ 2554, 2555. *In re Dissonay.* 235

2. Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree. *Held* that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (§ 8347, subd. 11). *Id.*

3. H. died leaving a will and three codicils; these were presented for probate, which was contested. On stipulation of the parties an order was entered to the effect that the personal assets of the estate be paid into court to abide the result of the litigation, and the surrogate thereupon took possession thereof. That officer admitted the will to probate, but denied probate of the codicils. The executors named

- therein, who had joined in the stipulation, appealed to the Supreme Court, where the decree of the surrogate was reversed as to the first codicil and affirmed as to the others. After the death of the surrogate, and on application of said executors to his successor, the decree was declared null and void, on the ground that the surrogate was interested. *Held* error; that the interest was not a disqualifying one; and that the parties by whose consent the trust was reposed could not be heard to complain; also, that as by law the funds on hand at the death of the said surrogate pass into the custody of his successor, the latter could not exercise jurisdiction to vacate the decree for a cause which existed equally as to himself. *In re Will of Hancock.* 284
4. As incident to the duty imposed upon surrogates by the Code of Civil Procedure (§§ 2473, 2481, 2743), to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. *In re Will of Verplanck.* 439
5. Among other assets left by a testator, which, by the will, his executors were directed to convert into money, was an interest in certain real estate which was incumbered by mortgages. The executors failed to sell; they paid off the incumbrances and expended further sums of money for taxes, and in the care and preservation of the property. A large proportion of said expenditures were after the expiration of the eighteen months. In the executors' accounts the items of payment upon the mortgages were entered as debts allowed and paid in a statement of "moneys paid, * * * to the creditors of the deceased." Certain contestants, among whom were infants, who appeared by special guardian, filed specific objections to the accounts. No objection was stated to the payment of the mortgages. The accounts were sent to an auditor; after the close of the evidence before him, the adult contestants stated that they would not press any objections to the accounts, in respect to said property. The guardian for the infant contestants filed no exceptions to the auditor's report, the adult contestants did; the surrogate decided that the notice given the auditor was equivalent to a withdrawal of all objections as to said expenditures. *Held* no error. *In re Estate of Weston.* 502
6. The adult contestants appealed, the special guardian did not. *Held*, the objection that the infants did not join in the notice, and so were not bound thereby, could not be urged upon the appeal; that the adult contestants were bound by their own action, and the infants by the decree which as they had not appealed was conclusive as to them. *Id.*
7. The repeal by the act of 1880 (Chap. 245, Laws of 1880) of the act of 1870 (Chap. 359, Laws of 1870) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the Repealing Act took effect. *Id.*
8. In proceedings so pending *held*, that the surrogate could not exceed the maximum amount limited by the Code of Procedure (§ 309); also that, although the costs were taxed after the Code of Civil Procedure without effect, they were not affected by its provisions, as by it (§ 3347, subd. 11) the provisions of the chapter (18), in reference to Surrogates' Courts, are, with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880. *Id.*

SUSPENSION OF POWER OF ALIENATION.

The will of V. contained a bequest to her executors of \$30,000 in trust "to pay over the net income of \$10,000, part of such sum" to each of three unmarried nieces of the testatrix, who were named, "so long as each remains single; upon the marriage of either to pay over to her \$1,000 of the principal of which she has enjoyed the income," and to pay over the residue of the \$10,000 to the surviving nephews and nieces of the testatrix. *Held*, that the provision did not involve an unlawful suspension of the power of alienation and was valid; that each legatee was interested only in \$10,000 of the trust fund, and as to each third the trust remained only for the life of the legatee, and when extinguished by her death or previous marriage the title to that portion of the bequest would immediately vest. *In re Will of Verplanck.* 439

TAXATION.

See ASSESSMENT AND TAXATION.

TENDER.

—When not conclusive as an admission of amount of lien.
See Talmage v. T. N. Bank. 531

TITLE.

—When title to land not brought in question by pleadings in action for assault and battery so as to entitle plaintiff to full costs when judgment is less than \$50.
See Langdon v. Guy. (Mem.) 660

TOWNS.

Where a railroad corporation, by proceedings under the General Railroad Act (§ 17, chap. 282, Laws of 1854), acquired title to lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, put-

ting in issue the necessity of the taking of all the lands sought to be condemned, *held*, that it was not open for the officials of the town to question, collaterally, the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway. *P. P. & C. I. R. R. Co. v. Williamson.* 552

—Right of town to have land under water granted to it by letters patent of colonial government.
see Robins v. Ackerly. 98

TRIAL.

1. The complaint, in an action for libel, alleged the writing and sending by defendant of a letter which contained the matter claimed to be libelous. At the beginning of the trial and before any evidence had been given, defendant objected to any evidence, on the ground that the letter was a privileged communication, which objection was overruled. At the close of plaintiff's evidence a motion was made for a nonsuit on the ground "that if the letter was not a privileged communication the proof showed that plaintiff had sustained no damage * * *, and the letter was not libelous on its face." *Held*, that the question as to whether the letter was a privileged communication was not effectively raised; that it was not presented by the motion for nonsuit, and the preliminary objection was unavailing, as there were then no facts before the court upon which it could be determined. *Brooks v. Harrison.* 88

2. Plaintiff's complaint alleged in substance, that defendant without lawful authority constructed a siding upon a street in the city of B., opposite plaintiff's premises; he claimed special damage caused by the occupation of the siding as a stand for its cars, cutting off access to plaintiff's lots, etc., and an injunction was asked restraining defendant from the use of the siding for its cars. The court im-

paneled a jury to assess the damages, reserving the question of law. The jury were instructed that in assessing the damages they were to assume that the siding was constructed without lawful right, and to take into consideration the annoyance plaintiff and his family had suffered. This was duly excepted to on the ground that the road was authorized by the common council of the city. The court subsequently directed judgment for the damages assessed and for an injunction restraining the use of the siding as a stand for cars, having decided against the plaintiff on the issue as to the lawfulness of the siding and basing its decision on the ground of unreasonable use. *Held*, that the charge was erroneous, as plaintiff was only entitled to the special damages caused by the improper use of the siding; and that defendant was entitled to a new trial. *Mahady v. Bushwick* R. R. Co. 148

3. Under the provision of the act of 1870 (Chap. 78, Laws of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the interest. *Manning v. Pt. H. Iron Ore Co.* 664

See CRIMINAL TRIAL

TROY (CITY OF).

1. At the general election, held in November, 1881, M. and F. were candidates for the office of alderman in the city of Troy. Two of the inspectors of election made out and signed a statement certifying that F. had received a majority of the votes cast. The other two inspectors refused to sign the same. The incomplete statement was filed

in the office of the city clerk, and F. took the oath of office. *Held*, that until the rights of the parties were tested in the courts and the result settled, the election was to be treated as a failure so far as either party sought to found a right upon it, and neither could claim any benefit therefrom; that the provision of the original charter of the city of Troy (§ 5, chap. 181, Laws of 1816), providing for the manner of electing aldermen, requiring inspectors of election by a written statement to certify and declare the result, and file their certificate in the office of the city clerk, has not been repealed or modified unless the general election law was applicable, and that makes the duties of inspector, in ascertaining and declaring the vote, even more specific; and that by such failure to elect, a vacancy was created. (§ 6, chap. 101, Laws of 1855.) *People, ex rel. Woods, v. Crissey.* 616

2. At the time of said election, M. was an incumbent of the office, having been elected for a term from March, 1881, to the general election of that year, under the amendment of the city charter of 1880 (§ 7, chap. 30, Laws of 1880), which changed the date of the municipal election from March to the day of the general election in November, and which provided for filling the short terms at the general election in 1880. *Held*, that as no successor to M. was "duly qualified," he held over under the provision of the city charter of 1870 (§ 6, title 6, chap. 598, Laws of 1870), declaring that "all persons elected or appointed under this act shall continue to hold their office until a successor is duly qualified"; that said provision applied to the office of alderman; that it was not inconsistent with the provisions of the amendatory act of 1880 in reference to the short term; and so it was not repealed by said act. *Id.*
3. F. who prior to the general election in November, 1881, had not sought to act as alderman, on the night before that election, resigned

and at that election fifty-five votes were cast for him for alderman "to fill vacancy." No public notice of his resignation, or of any vacancy in the office, or of an election to fill such vacancy had been given, nor had the common council directed an election to fill a vacancy. At a special meeting of the common council held a week after the election under call of the mayor, "for the purpose of canvassing the votes for mayor and school commissioners," D. F., city clerk, read the resignation of F. and announced the votes cast for him to fill vacancy. The president declared F. to be elected, and entitled to qualify and take his seat; the oath of office was administered and filed, and F., against the remonstrances of some of the board, acted as alderman. *Held*, that the sole effect of the resignation was upon F. as a contestant, and was an abandonment of his claim; that the only mode of filling the vacancy was by order of the common council, directing an election and determining the time and place (§ 8, chap. 131, Laws of 1816; § 2, chap. 298, Laws of 1854; § 4, chap. 101, Laws of 1855); and that, therefore, F. was not elected. *Id.*

4. Immediately after the adjournment of said meeting of the common council, the new mayor, by order in writing, suspended D. F. from office, and then nominated and appointed O'B. city clerk *pro tem.*; by him the roll of new members was called; six old and seven newly-elected members answered to their names. The seven took the oath of office before O'B., who was a notary public, and filed their oaths in the office of the city clerk, and thereupon the thirteen, with M., fourteen constituting a quorum, proceeded to act as a board. K. was nominated and confirmed as city clerk. *Held*, that the meeting was lawful and lawfully constituted; that the action of the seven new aldermen, even if they did not legally take the oath of office, was valid; also that while the suspension of D. F. did not amount to a removal, the nomination or confirmation of

K. had that effect; that the city clerk, having no fixed term of service, could be removed at pleasure by the proper appointment of a successor. *Id.*

5. The common council so constituted proceeded to elect two police commissioners; it was resolved that they be elected at one time and by one ballot, each voting for but one. Eight voted for M.; six for C. By the rules of the common council, the assembly rules as laid down in *Croswell's Manual* are made controlling. *Held*, that conceding the provision of the charter of 1880, confining the vote of each alderman in the election of police commissioners to one of the two to be chosen for the same term, to be unconstitutional, it imposed no restraint and the aldermen must be deemed to have voluntarily voted as they did, and the failure to exercise their full rights did not affect the vote actually given; that as under the assembly rules, a quorum being had, a majority of all present voting for the specific office, was sufficient to elect, there being a quorum present, and the officer chosen in each case having received not only a majority of those voting to fill that office, but all of those so voting, was legally elected. *Id.*

6. The provision of said act of 1880 (§ 10), requiring that "the compensation or salary of any officer shall be fixed before his appointment," does not require the salary to be fixed before every new appointment; when once properly attached to the office it is sufficient. *Id.*

7. The power given by said act (§ 3) to the mayor, to suspend any appointed officer for misconduct or neglect, was simply incident to and depended upon the power of removal given to the common council, and was repealed, as to police commissioners, by the provision of the amendatory act of 1881 (§ 1, chap. 76, Laws of 1881), which gives to the Supreme Court exclusive jurisdiction and power to remove them. *Id.*

8. The said act of 1881 is not repugnant to the constitutional provision requiring (Art. 3, § 16) a local bill to embrace but one subject, and that to be expressed in the title. *Id.*
9. Where, therefore, a warrant for supplies was drawn by M. & C. and by H., a duly appointed commissioner, but who had been suspended by the mayor after the going into effect of the act of 1881, as three of the four police commissioners of said city, and was presented to defendant, as comptroller, to be countersigned, which was necessary before payment could be demanded, *held*, that the signers of the warrant were lawfully police commissioners; and that a peremptory *mandamus* was proper, requiring the comptroller to countersign said warrant. *Id.*
- TRUSTS AND TRUSTEES.
1. U., plaintiff's intestate, in 1850 deposited a sum of money in a savings bank, which was credited to an account then opened with her, in trust for S. J. U., her daughter. The bank issued a pass-book, in which the account was entered, as with her, in trust for her said daughter. This deposit was subsequently drawn out. In 1874, U., having sold a house and lot, deposited \$2,000 to the credit of said account, which was entered in said pass-book. She also, at the same time deposited \$25 to the credit of an account, with her in trust, for a grand-daughter, receiving another pass-book therefor, and on the same day she deposited the balance of the purchase-money received to her own credit, in another savings bank. U. retained the pass-book until her death. In an action to determine the title to the deposit, *held*, that the transaction disclosed an intention to create a trust for the benefit of the daughter; and that the latter was entitled to the fund. *Willis v. Smyth.* 297
2. Also *held*, the fact that prior to the second deposit the daughter was married, and so bore a different name, at that time, and that the name was not changed in the account, did not affect the question, as the deposit was clearly made for her benefit. *Id.*
3. Also *held*, the fact that U. drew the interest on the deposit did not change or affect the character she had given to it as a trust fund; nor did the fact that she had offered to loan the money, after the deposit was made; or that she, in the first place, proposed to deposit the whole purchase-money in the bank where the balance was deposited. *Id.*
4. *It seems* that where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors. *Harpending v. Munson.* 650
5. *It seems*, also, that a director of a railroad corporation may properly own its bonds secured by mortgage executed by it, and may enforce payment in case of default by foreclosure. *Id.*
6. *It seems*, also, that where a director so owning bonds of the company becomes the purchaser on foreclosure, an action cannot be maintained to impress a trust upon the property for the benefit of stockholders, because of fraudulent conduct on the part of the director in procuring the default which caused the foreclosure, at least without paying or offering to pay to him the amount of the bonds. The equity of stockholders, if any, is only in the surplus after payment of the bonded debt, and the action would be in effect a bill to redeem. *Id.*

USAGE.

A local usage cannot be set up to contradict or alter a rule of law.
Corn Exchange B'k v. Nassau B'k.

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USURY.

1. By an agreement between co-partners engaged in the business of banking, each of whom contributed to the capital of the firm, it was stipulated that each partner should be allowed six and one-half per cent per annum on the average amount of his deposits, and if either should overdraw his account, he should pay interest on the average of such overdrafts at the rate of ten per cent per annum during the continuance of the partnership. F., one of the partners, overdraw his account, and gave to plaintiff, as trustee for the firm, his bond and mortgage for the balance against him, as shown by the partnership books interest being charged against him as stipulated. The co-partnership was dissolved by the death of F. In an action to foreclose the mortgage, wherein the defense was usury, the trial court found that the agreement was not a device to evade the usury law. *Held*, that the overdrafts were not usurious loans, that the agreement was in effect simply that the partner withdrawing funds should make a contribution to profits equal to the estimated earning power of the capital withdrawn, and so was valid.
Payne v Freer.

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2. When the partnership was formed there were certain notes outstanding indorsed by F. and which, as between him and the makers, were for him to pay; these were taken up by the firm, and were renewed from time to time, the interest being charged to the account of F. at the stipulated rate, and the advances to take up the notes were finally also charged. *Held*, that these advances were overdrafts within the meaning of the partnership agreement and were not usurious.
Id.

3. Defendant, who resided in Illinois, having collected certain moneys belonging to S., a resident of this State by an agreement with the latter sent to him by mail in place of the money, his (defendant's) notes for the amounts, dated at his place of residence in Illinois, payable with ten per cent interest, which rate of interest was lawful in that State. In an action upon the notes wherein the defense of usury was pleaded, *held*, that their validity was to be determined by the law of Illinois, and as they were valid there they were valid here; and this although one of the notes was made payable in this State. *Sheldon v. Haztun.*

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4. Defendant was formerly a resident of this State. When here he borrowed of S. \$1,500 giving his note therefor, executed here but dated at a place in Illinois, payable with ten per cent interest. After the defendant had become a resident of Illinois S. sent the note, which was then past due, to him by mail, requesting a new note for the balance of principal unpaid, this defendant sent by mail, the new note being dated in Illinois, payable one year from date, with ten per cent interest. *Held* (ANDREWS, Ch. J., and MILLER, J., dissenting), that although the original note was usurious and void, yet, in the absence of any evidence of an intent to evade the usury laws of this State, the new note was to be regarded as an Illinois contract; that the surrender of the old note was a good consideration therefor; and that it was valid.
Id.

5. Where a usurious contract is mutually abandoned by the parties and the securities given therefor canceled and destroyed, a subsequent promise by the borrower to pay the money actually loaned is not tainted by the original usury, is for a good consideration, and can be enforced.
Id.

6. The purchase of a debt by one at the instance of the debtor for less than its face, the debtor himself with the knowledge of the purchaser paying the creditor the dis-

count, is not *per se* usury. *Siewert v. Hamel.* 199

7. It must be made to appear that the transaction originated in an agreement for a loan, as there can be no usury disconnected with a loan. *Id.*
8. Where the guardian of an infant loans moneys, belonging to his ward, receiving securities for the amount loaned, with lawful interest; but as an inducement to make the loan, receives a sum of money, as a bonus, for his own benefit from the borrower, who pays the same with knowledge as to the title to the moneys loaned, this does not make the transaction a usurious loan. The guardian is not a lender of the trust fund, within the meaning attached to that term by our statutes, relating to usury. *Fellows v. Longyor.* 324
9. A devisee cannot maintain an action to have a mortgage upon the lands devised, executed by his testator to secure a usurious loan, canceled because of the usury, without first paying, or offering to pay, the sum actually loaned; he is not a "borrower" within the meaning of the provisions of the usury laws (1 R. S. 772, § 8; § 4, chap. 430, Laws of 1837), declaring such payment or offer to be unnecessary as a condition of granting relief where suit is brought by the borrower. *Buckingham v. Corning.* 525

VENDOR AND PURCHASER.

1. One who has sold, as genuine, a forged note cannot avoid his liability to refund the purchase-money, because of delay in detecting the forgery; no mere lapse of time, however long, can confirm his title to the money, if the vendee exercise reasonable diligence in giving notice of the discovery of the forgery. *Frank v. Lanier.* 112
2. Defendants in November, 1867, sold to plaintiffs four counterfeit U. S. "seven-thirty notes," which were sold by plaintiffs, on the same

day, to various parties; in December, 1867, plaintiffs were notified that they were forgeries, and, on the same day, notified defendants, and demanded back the money paid. Defendants' reply was that if plaintiffs "had to pay for those notes, or brought them evidence that they were counterfeit, they would pay." In January, 1868, plaintiffs were sued for the money received by them for three of the notes; they gave notice to defendants, and requested them to defend; this they did not do. Judgment was obtained against plaintiffs in March, 1878; after the verdict therein they notified defendants of the result. Plaintiffs paid the judgment and also paid back the money received for the other note. *Held*, that defendants having been afforded an opportunity to take back the paper, or establish its value, and not having done either, could not be heard to say that it was unreasonable for the plaintiffs to await the result of a judicial determination as to the character of the paper, or, that having done so, they were not entitled to recover back the money this determination showed they had paid without consideration. *Id.*

3. In an action by a vendee of personal property against his vendor for breach of warranty of title, express or implied, damages can only be recovered for actual loss. *O'Brien v. Jones.* 193
4. The plaintiff in such action must establish that his vendor is without title; that another is the true owner; and that he has restored the property to such owner, that it has been taken from him under compulsory proceedings, or that he has parted with money or property in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property. *Id.*

WAREHOUSEMEN.

1. Warehousemen are liable for losses occasioned by innocent mistakes on their part in delivering

goods to those not entitled to receive them. *Br of Oswego v. Doyle.* 32

2. Plaintiff and the firm of C. A. & Co., of which firm defendant C. A. was a member, entered into an agreement by which the former agreed to advance money to purchase a cargo of wheat at Toledo, Ohio, the same to be consigned to plaintiff at Oswego, and held by it as security for the advances. In pursuance of the agreement the wheat was purchased and shipped on board a schooner, of which defendants were joint owners. The bill of lading provided for the delivery of the wheat to plaintiff, and was indorsed over and delivered to it on payment by it for C. A. & Co. of a draft drawn upon and accepted by that firm. On arrival of the schooner at Oswego, C. A. reported it to plaintiff's cashier, who consented that the wheat might remain on board the vessel. Of this arrangement the defendants, other than C. A., had no knowledge. A portion of the cargo was sold and delivered on orders of plaintiff; the balance was removed and disposed of with ut its consent or knowledge by C. A. & Co. In an action to recover the value of the balance so taken, *held*, that defendants were liable; that conceding their liability as common carriers had ceased, as to which *quære*, before the wheat in question was removed, they were liable as warehousemen. *Id.*

WARRANTY.

1. In an action by a vendee of personal property against his vendor for breach of warranty of title, express or implied, damages can only be recovered for actual loss. *O'Brien v. Jones.* 193
2. The plaintiff in such action must establish that his vendor is without title; that another is the true owner; and that he has restored the property to such owner, that it has been taken from him under compulsory proceedings, or that he has parted with money or property

in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property. *Id.*

WILLS.

1. Where the attestation clause to a will is full and complete, it is not always essential that all the particulars required by the statute to constitute a valid execution of the instrument should be expressly proved. The presumption is in favor of due execution, and a failure of recollection on the part of the subscribing witnesses will not defeat the probate where the surrounding circumstances, taken together with the attestation clause, satisfactorily establish such execution. *In re Will of Pepoon.* 255
2. The witnesses to a will, the attestation clause to which was in due form, and which was executed more than fourteen years before the death of the testatrix, testified in substance that they had not a clear recollection of what occurred at the time of the execution, that they must have read or heard read and understood the purport of the attestation clause, as they never signed any document without knowing its contents, and that they would not have signed if the facts stated in said clause had not occurred, one of them also testified that the signatures of the testatrix and the two witnesses were made in the presence of each other, and that he recollected that said clause was read or that he heard it read. *Held*, that the evidence justified the admission of the will to probate. *Id.*
3. A will was written upon the two sides of a piece of paper; the subscribing witnesses signed their names at the bottom of the first side and again at the top of the second side, following which was an important provision of the will. *Held*, that as one of the requisites prescribed by the statute for the formal execution of a will, *i. e.*, that the attesting witnesses shall sign their names at the end thereof

(3 R. S. 68, § 40, subd. 4), had not been complied with, probate of the instrument was properly denied; and that the refusal of the surrogate to hear proofs was not error. *In re Will of Hewitt.* 261

4. The will of V. contained a bequest to her executors of \$30,000 in trust "to pay over the net income of \$10,000, part of such sum" to each of three unmarried nieces of the testatrix, who were named, "so long as she remains single; upon the marriage of either to pay over to her \$1,000 of the principal of which she has enjoyed the income," and to pay over the residue of the \$10,000 to the surviving nephews and nieces of the testatrix. *Held*, that the provision did not involve an unlawful suspension of the power of alienation and was valid; that each legatee was interested only in \$10,000 of the trust fund, and as to each third the trust remained only for the life of the legatee, and when extinguished by her death or previous marriage the title to that portion of the bequest would immediately vest. *In re Will of Verplanck.* 439
5. The residuary personal estate of the testatrix she gave to her nephews and nieces, the "sons and daughters" of her brother J., and of her sister E., "to be divided equally between them," and in case of the death of any such nephew or niece before the testatrix it was provided that "what would have been his or her share if living, I give to his or her issue, if any, equally. If there be none then to the survivors of my last aforesaid nephews and nieces and the issue of those deceased *per stirpes* and not *per capita*." At the time of the execution of the will and at the death of the testatrix her brother J. had two children, a son and a daughter, and her sister E. had nine children living. *Held*, that in the absence of any thing in other portions of the will showing a contrary intent, said nephews and nieces took *per capita*, not *per stirpes*. *Id.*
6. By a codicil the testatrix gave to the children of her brother J., "as a part of their *share* of such residuary bequest," a bond and mortgage executed to the testatrix by their father. *Held*, that this was not indicative of an intention that said children should take *per stirpes*. *Id.*
7. Also *held*, that the amount due upon the mortgage was to be deducted from the shares of the children of J. *Id.*
8. The will of B. disposed of his property as follows: "I leave to my beloved wife, Mary Ann, all my property * * * to be enjoyed by her, for her sole use and benefit, and in case of her decease, the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son Charles, * * * requesting him, at the same time, that he will use well and not wastefully squander the little property I have gained by long years of toil." Charles was a son of the wife by a former husband. In an action for a construction of the will, *held*, that the widow took an absolute title, and therefore the power to dispose of the whole estate, unaffected by the provision as to her son. *Campbell v. Beaumont.* 464
9. *It seems* that if a limitation was intended, it is inconsistent with the absolute gift to the wife and is void. *Id.*
10. In drawing an instrument presented for probate as a will, a printed blank consisting of four pages was used. The formal commencement was printed on the first page and the formal termination printed at the foot of the third page. The entire blank space was filled in, in writing; and apparently for want of room, a portion of a paragraph containing material provisions was carried over, and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or any thing indicating their relation to each other. The name of

the testator was written at the end of the printed form, and the names of the witnesses written below under the formal attestation clause on the third page. *Held*, that this was not a subscription "at the end of the will," such as is required by the Revised Statutes (2 R. S. 63, § 40); that the parts of the will preceding the signatures could not be received, as so far as its execution was concerned, the will was valid or invalid as a whole; and that probate was properly denied. *In re Will of O'Neil*. 516

11. *It seems* that a document containing testamentary dispositions not authenticated according to the provisions of the statute of wills may not be held to be a part of a valid will, simply because it is referred to in the body of the will. *Id.*

13. Where a will executed by one, having full testamentary capacity, and duly admitted to probate, contained a legacy to the draughtsman, an attorney, who, at the time of the execution of the will, was, and for a long time previous had been, the counsel of the testator, *held*, that this alone did not raise a presumption, in aid of one seeking to overthrow the will, that the influence of the attorney was unduly exercised, nor did it, in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled; that it was for the plaintiff, therefore, in an action brought to set aside the will, to give some other evidence tending to show fraud or undue influence. *Post v. Mason*. 539

13. A court of equity has no jurisdiction to set aside a will of personal property, which has been duly admitted to probate, because of fraud or undue influence; the probate is conclusive. (2 R. S. 61, § 29.) *Id.*

14. Nor can executors, as to a gift to them in a will so admitted to probate, be charged by a court of equity, as trustees of the next of

kin, on the ground that the gift was obtained by fraud. *Id.*

15. The will of H. gave to his two sons each an undivided half of certain real estate; to his son A. a legacy of \$5,000; to his son J. \$2,000, and discharged him from all indebtedness for sums advanced, thus, as the testator declared, making the shares of his two sons equal. After certain specific bequests and legacies he gave the rest and residue of his estate, real and personal, to S., one of his executors in trust. *First*, to pay the interest, or so much thereof as should be necessary to the support of the testator's father during life. *Second*, to pay out of the proceeds of said residuary estate to the O. C. Seminary \$15,000, and the balance with any unexpended income to the two sons in equal proportions. The executor was empowered to sell as he should think just. The testator inventoried his personal property about a month before he made the will at \$23,500. He thereafter purchased real estate, built a house upon his lands, etc., and the proceeds of the personalty remaining at his death after the payment of debts amounted to but about \$2,000. *Held*, that the legacy given to A. was chargeable upon the residuary real estate. *Scott v. Sebbins*. 605

16. Also *held*, that an action to have said legacy declared a lien upon the residuary real estate was properly brought within ten years after the cause of action arose; that the six years' statute of limitations did not apply. *Id.*

17. The executors brought an action for the construction of the will. F., to whom A. had assigned his legacy, was made a party; he had, however, before the commencement of the action, transferred it to D. In that action it was adjudged that the legacy was not chargeable upon said real estate. *Held*, that said judgment was not a bar to this action, and this, although D. subsequently reassigned to F. *Id.*

WITNESS.

The provision of the Revised Statutes (2 R. S. 701, § 28), rendering a person "sentenced upon a conviction for felony" incompetent to testify as a witness, was repealed by the provision of the Code of

Civil Procedure (§ 882), declaring that a person "convicted of crime or misdemeanor is notwithstanding a competent witness in a civil or criminal action," etc., and a person convicted and sentenced is competent as well as one convicted only. *People v. McGloin.* 241

ERRATA.

In *Ferrar v. McCus* (89 N. Y. 144), the word "appellant" in thirteenth line from top of page, should read "respondent."

In *Presdt, etc., v. Whitehall* (90 N. Y. 31), in second line of head-note, "1868" should read "1853". The same correction should also be made on page 23, second line from top of page ; and in index, page 763, fifth line, under title "Railroad Corporations."

In *Waring v. Somborn* (83 N. Y. 605), "Boyce" in eighth line from top of page, should read "Bryce," and "59" should read "55."

In 81 N. Y. 303, "56 N. Y." in fourth line from top of page, should read "52 N. Y."

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